ABDA AIRFREIGHT SDN BHD

v.

SISTEM PENERBANGAN MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S1-22-481-1996]
12 JUNE 2001

CONTRACT: *Illegality - Contract of carriage - Agreement to handle carriage of air passengers' baggage - Violation of foreign state's customs laws - Deception of foreign customs authorities - Whether agreement a sham - Whether tainted with illegality - Whether void and unenforceable - Agreement repudiated by defendant - Whether justified - Carriage by Air Act 1974, articles 2, 16 of First Schedule - Carriage by Air Act (India) 1972 s. 4 - Contracts Act 1950 ss. 24, 25*

The plaintiff ('ABDA') is a freight forwarding company while the defendant ('MAS') is the National Flag Carrier of Malaysia. By an agreement dated 22 November 1995 executed between the parties ('the agreement'), MAS granted exclusive right to ABDA to handle the carriage of its passengers' unaccompanied baggage for the Kuala Lumpur-Madras flights. The agreement stipulated that ABDA would provide MAS with a special product known as "ABDA Baggage Service". However, as MAS were to subsequently discover, the special service turned out to be that: (i) ABDA would declare the passengers' baggage at the port of departure as 'unaccompanied baggage' but would off-load the same at Madras airport as 'accompanied baggage'; and (ii) ABDA would alter the status of the baggage so as to enable it to discharge same at the passenger arrival hall, instead of at the cargo terminal. The facts further showed that the arrangement could only be and had been effected at the expense and violation of Indian customs laws, as well as the suppression by ABDA of two documents relating to the carriage, namely the Airway Bill and the Cargo Manifest.

Barely two months into the agreement, MAS started to receive complaints from its handling agents in India, namely AIR INDIA, as well as Indian customs authorities, as to the inappropriateness of unloading the baggage at the arrival hall of Madras airport. Having appraised of the problems, MAS suspended the agreement in February 1996, and subsequently, on 16 March 1996, terminated the agreement. ABDA sued MAS for breach of contract claiming special damages of RM365,224.88 and general damages for tarnished reputation. The main question that arose was whether MAS on the facts and in the circumstances could avoid the agreement for illegality.

Held:

[1] The object and intent of the agreement was to consign the excess baggage as unaccompanied baggage flying from Kuala Lumpur to Madras. However, since the status of the baggage was altered to accompanied baggage upon arrival at Madras, there was clear deception of the Indian customs authorities by ABDA. (pp 7 e-f & 20 c-d)

[1a] The agreement was nothing more than a mere sham. Read collectively and in its correct perspective, the agreement was intended to give an appearance of creating between the parties rights and obligations which were different from the actual rights and obligations the parties had intended to create. (p 19 e-f)

[2] Under the agreement, ABDA was obliged to secure all requisite permissions and approvals both at Kuala Lumpur and Madras, so as to comply with all the laws, regulations and customs rules of both governments. This obligation has not been fulfilled by ABDA. (p 24 b-g)

[2a] Likewise, under the agreement, ABDA was the shipper/consignor of the unaccompanied baggage and that MAS was only the carrier of the transhipment. Further, ABDA was not an agent of MAS. However, by displaying MAS' logo at the airport terminal against the backdrop of "ABDA Baggage Sdn Bhd" ABDA had not only violated the term of the agreement but had misrepresented itself as MAS' agent. (p 28 e-g)

[3] MAS was entitled to terminate the agreement even without assigning any reason thereto. By so doing, MAS could still rely on any ground available at the time of the termination. In any case, on the facts, ABDA knew the reasons for the termination, as MAS had informed them of the attendant problems at Madras airport *vide* letter dated 11 March 1996. (p 42 b-f)

[4] The arrangement contemplated by ABDA and MAS could not be legally performed in India without directly violating the Indian customs laws and without visiting MAS and its passengers with serious penal consequences. Tainted with illegality, MAS was justified in repudiating the agreement. (pp 63 b-c & 64 g-h)

[5] Though the agreement may not appear *ex facie* illegal in Malaysia yet the agreement was illegal in India, and so, by virtue of public policy, it must be regarded as illegal and unenforceable in Malaysia. (p 66 d-f)

[Plaintiff's claim dismissed.]

Case(s) referred to:

Alexander v. Rayson [1936] 1 KB 169 ***(refd)***

Amalgamated Steel Mills Bhd v. Ingeback (Malaysia) Sdn Bhd [1990] 1 CLJ 750; [1990] 1 CLJ (Rep) 576 ***(refd)***

British And Beningtons Ltd v. North Western Cachar Tea Company, Limited [1923] AC 48 ***(refd)***

Belmont Finance Corporation Ltd v. Williams Furniture Ltd [1979] Ch 250 ***(refd)***

Bhojraj v. Sita Ram & Ors [1936] PC 60 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Clay v. Yates [1856] 1 H & N 73 ***(refd)***

Collins v. Blantern [1767] 2 Wils KB 341 ***(refd)***

Cope v. Rowlands [1836] 2 M & W 149 ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 ***(refd)***

De Silva v. PP [1964] MLJ 81 ***(refd)***

Foster v. Driscoll [1929] 1 KB 470 ***(refd)***

Girardy v. Richardson [1793] 1 Esp 13 ***(refd)***

Holman v. Johnson [1775] 1 Cowp 341 ***(refd)***

Hopewell Construction Co Ltd v. Eastern & Oriental Hotel (1951) Sdn Bhd [1988] 2 MLJ 621 ***(refd)***

Idris Haji Mohamed v. Ng Ah Siew [1935] MLJ 257 ***(refd)***

JM Allan (Mercandising) Ltd v. Cloke [1963] 2 QB 340 ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 ***(refd)***

Koh Kim Chai v. Asia Commercial Banking Corp Ltd [1981] 1 MLJ 196 ***(refd)***

Kuppusamy Berapanas v. Anggamah Ramasamy & Anor [1991] 2 CLJ 1540; [1991] 3 CLJ (Rep) 97 ***(refd)***

Kurup v. PP [1934] MLJ 17 ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 ***(refd)***

Lowe v. Peers [1768] 4 Burr 2225 ***(refd)***

Mak Sik Kwong v. Minister Of Home Affairs, Malaysia (No 2) [1975] 2 MLJ 175 ***(refd)***

Marble Terrazzo Industries Sdn Bhd v. Anggaran Enterprise Sdn Bhd [1991] 1 CLJ 109 ***(refd)***

Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH The Mihalis Angelos [1970] 3 WLR 601 ***(refd)***

ML Samuel v. Bhadur Singh alias Bahadur Singh [1938] 7 MLJ (SSR) 173 ***(refd)***

Mohamed Alias v. PP [1983] 2 MLJ 172 ***(refd)***

Mosque known as Masjid Shahid Ganj and Others v. Shiromani Gurdwara Parbandhak Committee, Amritsar and Another [1940] AIR 116 ***(refd)***

Ng Siew San v. Menaka [1973] 2 MLJ 154 ***(refd)***

Oom v. Bruce [1810] 12 East 225 ***(refd)***

Pearce v. Brooks [1866] LR 1 Exch 213 ***(refd)***
Pie Chin v. PP [1985] 1 MLJ 234 ***(refd)***
PP v. Datuk Haji Harun Haji Idris (No 2) [1977] 1 MLJ 15 ***(refd)***
PP v. Mohamed Ali [1962] 28 MLJ 257 ***(refd)***
PP v. Sanassi [1971] 2 MLJ 198 ***(refd)***
Re Mahmoud and Ispahani [1921] 2 KB 716 ***(refd)***
Re Trepca Mines Ltd (No 2) [1963] Ch 199 ***(refd)***
Regazzoni v. KC Sethia (1944), Ltd [1956] 1 All ER 229 ***(refd)***
Ridgway v. Hungerford Market Co [1835] 3 A & E 171 ***(refd)***
Said Ajami v. Comptroller Of Customs [1954] 1 WLR 1405 ***(refd)***
Scott v. Brown, Doering, McNab & Co Ltd [1892] 2 QB 724 ***(refd)***
Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21 ***(refd)***
Siow Kwang Joon v. Asia Commercial Finance (M) Bhd [1996] 3 MLJ 641 ***(refd)***
Snook v. London And West Riding Investments Ltd [1967] 2 QB 786 ***(refd)***
State (Delhi Administration) v. Pali Ram AIR [1979] SC 14 ***(refd)***
STU v. The Comptroller of Income Tax [1962] 28 MLJ 220 ***(refd)***
Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200 ***(refd)***
Tan Chong & Sons Motor Company Sdn Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 ***(refd)***
Taylor v. Oakes, Roncoroni & Co [1922] 127 LT 267 ***(refd)***
Tong Kheng Bros (M) Sdn Bhd v. Anuarul Aini Mohd Perai [1990] 2 CLJ 715; [1990] 3 CLJ (Rep) 292 ***(refd)***
Tukaram v. Jaganath AIR [1923] Bombay 236 ***(refd)***
Tunku Kamariah Aminah Maimunah Iskandariah Sultan Iskandar v. Dato' James Ling Beng King [1989] 2 CLJ 244; [1989] 2 CLJ (Rep) 658 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(a), (b), (e), 25
Evidence Act 1950, ss. 45, 59, 92(a), 119

Carriage by Air Act 1972 [India], s. 4

Other source(s) referred to:
Raoul Colinvaux, *Carver's Carriage By Sea*, vol 1, 12th edn, pp. 506-507
Shawcross and Beaumont, *Air Law*, 4th edn, vol 1, Issue 83, 2001

For the plaintiff - Sri Dev Nair; M/s Hardarshan Kaur Gill & Co
For the defendant - Saranjit Singh; M/s KS Narayanan & Assocs

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

The plaintiff, ABDA AIRFREIGHT SDN BHD, was and is at all material times, a freight forwarding and cargo handling company (hereinafter referred to as "ABDA"), while the defendant, was and is our National Flag Carrier that goes by the name of Sistem Penerbangan Malaysia Berhad (hereinafter referred to as "MAS").

By way of a sales agency agreement dated 28 September 1995, ABDA entered into an agreement with MAS (see p. 1 to p. 3 of L15 marked as exh. "D12") which appeared to be mutually beneficial to both parties. There was also an agreement between ABDA and MAS in regard to the "Uplift of Unaccompanied Baggage" dated 22 November 1995 (hereinafter referred to as an "agreement") which can clearly be seen at p. 14 to p. 15 of L15 marked as exh. "D12" and this agreement was worded as follows:

> AGREEMENT BETWEEN MALAYSIA AIRLINES BHD
> AND ABDA AIRFREIGHT SDN BHD ON
> UPLIFT OF UNACCOMPANIED BAGGAGE
>
> Malaysia Airlines (MH) and ABDA Airfreight Sdn Bhd (ABDA) hereby agree to the carriage of unaccompanied baggage for ABDA on MH services as stated below.
>
> 1. Sector.
> KUL-MAA, KUL-KHI and KUL-DEL.
>
> 2. Rate.
>
> 2.1 Between 1st December 1995 to 31 May 1996.
> LD3 rate: RM 1100 per LD 3 Nett (Pivot weight 550 kg).
> Over pivot rate: RM2.00/KG Nett.
>
> 2.2. Between 1st June 1996 to 30 November 1996.
> LD3 rate: RM1,650 per LD3 Nett (pivot weight 550 kg).
>
> Over pivot rate: RM3.00/KG Nett.
>
> 3. Each container has a guaranteed pivot weight of 550 kgs.
>
> 4. Effective 1st December 1995, with exclusive rights granted to ABDA for up to 24 months with a view to consider a further extension of another 12 months after completion of the 24 months.
>
> 5. Rates to be reviewed after a 12 months period.

6. Operational conditions are as per minutes of meeting dated 16 November 1995.

7. MH will not be responsible for any claims from this arrangement.

for MALAYSIA AIRLINES	for ABDA AIRFREIGHT SDN BHD
Signature Sgd. (Illegible)	Signature Sgd. (Illegible)
JJ ONG	ZAINAL ABIDIN
General Manager (Cargo Sales)	Managing Director
Name: ONG JYH JONG	Name: ZAINAL ABIDIN
Title: GENERAL MANAGER (CARGO SALES)	Title: MANAGING DIRECTOR
Date: 22 Nov '95	Date: 22/11/95

and the focal point of attention would be this very agreement. This agreement was short-lived. Three months thereafter, the agreement was brought to an end by MAS, notwithstanding the fact that both parties mutually enjoyed the benefits that accrued under the agreement. It was sometime in March 1996 that MAS terminated the agreement. To be exact, the termination took place on 16 March 1996.

The learned counsel, in the person of Mr Saranjit Singh who acted for MAS, aptly described the demise of the agreement as timely "before extensive and irreparable damage could have been inflicted onto our National Airline and to our national pride in general."

ABDA filed a writ of summons and in its statement of claim as seen at p. 7 of the "Ikatan Pliding" marked as exh. "D11" particularly at para. 7 it sought for (i) special damages to the tune of RM365,224.88 and (ii) general damages consequent upon the damage to its image and reputation. ABDA too sought for:

(iii) interest at the rate of 8% per year from the date of filing of the writ to the date of full settlement;

(iv) costs; and

(v) any other relief which this Honourable court deems fit and fair.

Product Offered By ABDA Under The Agreement

Under the agreement, ABDA proposed and invited MAS to become partners of a special product known as "ABDA Baggage Service." This special product offered by ABDA was distinct and independent from the services envisaged under the sales agency agreement. The scope of ABDA as an agent under the sales agency agreement was quite limited and it was governed by cl. 1 which laid down the following terms:

1.(a) The authority of the Agent to represent the Carrier shall be specifically limited to the authority expressly granted by this Agreement and any other documents between the parties as forming part of this Agreement. Any reference to "this Agreement" hereinafter shall therefore include the said documents made a part hereof.

(b) Subject to the provision of this Agreement, the Agent shall represent the Carrier in the sale of air cargo transportation other than mail over the services of the Carrier.

(c) The Agent shall maintain an office engaged mainly in the sale of air cargo transportation and also the handling of consignment. The Agent shall also maintain suitable physical facilities to promote adequately the sale of such transportation and ensure the efficient handling of such consignments, and further to provide by all reasonable means the related services openly and publicly.

(d) The Agent shall abide by the terms, representations and conditions in any application made by the Agent to the Carrier for the purpose of causing the Carrier to list and maintain it on the official Carrier's Agency list.

Pure and simple, the ABDA Baggage Service involved the carriage of passengers' excess baggages as "unaccompanied baggage" from the port of departure but discharged, unloaded and off-loaded at the port of destination as "accompanied baggage." It was a scheme that was so well designed that even MAS was convinced that it was a good business venture. But alas, there were many pitfalls that jolted MAS to the realities of the harsh business world. For starters, the actual status of the baggage was altered by an act of deliberate suppression and withholding of two very important documents. The first being the air way bill, while the second being the cargo manifest. These two crucial and key documents gave the baggages the status of "unaccompanied baggage" and, consequently, considered as "cargo" for all intents and purposes. The suppression of these two documents brought with it dire consequences.

The life span of the agreement was slightly more than two months. Towards the end of February 1996 problems surfaced. MAS handling agents in Madras namely, Air India, began raising queries as to why containers carrying baggages recorded in a cargo manifest and registered as "cargo" in the compartment planning message (CPM) were being discharged at the passenger arrival hall instead of at the cargo complex where cargo including "unaccompanied baggage" ought to be discharged. Indian customs officers were curious and they began questioning the propriety of using ABDA baggage tags on baggages rather than using MAS baggage tags. It must be borne in mind that MAS baggage tags for accompanied baggages form part and parcel of MAS's airline ticket after the passengers have checked in. The incessant queries by the Indian customs officers excited MAS officials in Madras. That started a chain link reaction. The MAS officials in Madras, without furtherado

and acting prudently, alerted Kuala Lumpur officials of these irregularities. It appeared that these irregularities contravened the Indian customs laws and regulations.

Acting prudently, MAS swiftly suspended operations under the agreement in order to conduct further investigations. ABDA through one gentleman by the name of Mr Jainula Abutheen bin Abdul Kapur (hereinafter referred to as "Jainula" (PW1)) was, in due course, informed of the pressing problems that needed to be addressed urgently and these problems were centred on:

(1) the propriety of discharging "unaccompanied baggage" at the passenger arrival hall in Madras;

(2) the use of ABDA baggage tags which were virtually similar to the baggage tags used by MAS; and

(3) the check in counter of "ABDA Baggage Sdn Bhd" – an associate company of ABDA, at the departure lounge of the Subang International airport had caused undue confusion.

ABDA dragged its feet and these pressing problems remained unresolved. MAS had no choice but to terminate forthwith the agreement on 16 March 1996.

In its statement of defence at para. 10 thereof, MAS pleaded, *inter alia*, the following lines of defence (see p. 21 to p. 22 of the "ikatan pliding" marked as exh. "D11"):

> (1) the delivery by the Plaintiff (ABDA) of the unaccompanied baggage as cargo through the passenger terminal at the destinations would and is violative of customs regulation(s) and that the plaintiff had not obtained the requisite clearances from the relevant authorities for the same;
>
> (2) that the "baggage tags" used by the plaintiff (ABDA) on the said cargo which were delivered at the passenger terminal were visually similar to (the) baggage tags placed by the defendant (MAS) on accompanied baggage of its passengers who are disembarking at the said destinations and that this would be confusing and misleading to the passengers and the relevant authorities;
>
> (3) that at the unaccompanied baggage counter of the plaintiff (ABDA) and its associate "ABDA Baggage Sdn Bhd" at the airport passenger terminal, the logo of the defendant's company (MAS) was improperly and unauthorisedly displayed which could mislead the public into believing that the plaintiff (ABDA) and its associate company 'ABDA Baggage Sdn Bhd' were the agents of the defendant (MAS) for dealing in unaccompanied baggage, which was not the case; and

(4) the abovementioned matters were brought to the notice of the plaintiff's company (ABDA) who did not provide any suitable explanation nor take any steps to rectify the same.

Now, in regard to the third line of defence as advanced by MAS, the photograph at p. 43 of the "ikatan dokumen-dokumen" marked as exh. "D12" was a sight to behold. That photograph conveyed the message that ABDA and its associate company by the name of "ABDA Baggage Sdn Bhd" were the agents of MAS in dealing with unaccompanied baggages. This message was hotly disputed by MAS.

Certain basic pieces of evidences must be put in the forefront and emphasis should be made on them. For brevity, these evidences may be listed in these fashions:

(i) It was entirely ABDA's idea to transport and uplift excess baggage as "unaccompanied baggage" to be carried by MAS from Kuala Lumpur to Madras where the collection would be made at the arrival hall conveyer belt. Jainula's witness statement in encl. 18 tells a tale of its own. Question 9 of PW1's witness statement was worded in this way:

> What is the difference between the services provided by the plaintiff with respect to unaccompanied baggage compared with other freight forwarders?

and the answer was framed in this way:

> Under a special arrangement between the respective airlines and the plaintiff (ABDA) our clients' unaccompanied baggages (are) sent on the same flight in which the clients/passengers travel and delivery is through the arrival hall conveyor belt at the airport destination unlike other freight forwarders unaccompanied baggages (are) usually sent on different flights and delivery is through the cargo terminal at the airport of destination.
>
> In this respect the service provided by the plaintiff (ABDA) is unique.

The notes of evidence at p. 16 indicated to all intents and purposes that ABDA proposed the arrangement of uplifting excess baggage as unaccompanied baggage.

Mr Ong Jyh Jong (DW1) (hereinafter referred to as "Ong") took the stand for MAS. In his witness statement in encl. 19, Ong was asked this question (refer to question 7):

Mr Ong could you please explain to the court who proposed this arrangement?"

and the answer was worded in this way:

> Sometime towards the end of October 1995, the plaintiff's managing director Encik Zainal Abidin wrote me a letter thanking me for the renewal of the Agency and proposed a special service which he termed as "ABDA BAGGAGE SERVICE" wherein ABDA would collect excess baggage belonging to passengers on board MH at least a day before the departure, put it in a container and have the same placed on board the aircraft as unaccompanied baggage and upon arrival at the port of destination, arrange for the baggage to be cleared at the passenger arrival hall instead of the cargo terminal.

It is pertinent to note that Zainal Abidin's letter was in fact dated 25 October 1995 and it can be seen at p. 4 of the ikatan dokumen-dokumen marked as exh. "D12". That letter surely makes for an interesting reading and I shall revert to it from time to time.

(ii) It can readily be seen that from two letters emanating from ABDA – one addressed to Ong dated 25 October 1995 (see p. 4 of "D12") and the other addressed to Tuan Hj Mohamed Ibrahim bin Bahari dated 30 November 1995 (see p. 17 of "D12"), that the purported purpose and objective in transporting or uplifting excess baggage as "unaccompanied baggage" at Kuala Lumpur was simply to:

(a) avoid the delay and hassle at Madras cargo customs; and

(b) utilise the low cargo tariff rates to transport excess baggage as "unaccompanied baggage" rather than as excess baggage where the rates are higher.

(iii) The mechanisms to put in motion ABDA's proposals were discussed between the officers from ABDA and MAS. Towards this end, operational charts were prepared and they can be found at pp. 8 to 13 of "D12". The arrangements between the parties may be summarised as follows:

(a) ABDA would collect all excess baggages of its customers who are boarding MAS's flight a day before take off and load them in containers purchased by ABDA themselves. ABDA will issue to their customers baggage tags styled as ABDA baggage tags (see exh. "P1"). All these excess baggages are then loaded in the containers as unaccompanied baggages.

(b) ABDA will cut out an airway bill stipulating the container load together with the corresponding separate cargo manifest evidencing the airway bill containing the "unaccompanied baggage". Supportive evidence on this point can be seen at pp. 8, 9, 13, 18 and 25 of "D12". Ong's witness statement in encl. 19 at question 12 was worded in this way:

Mr. Ong, could you please explain to the court the workings or the operation of this arrangement as agreed between the parties?

and the answer was worded in this way:

(i) Firstly ABDA will collect all excess baggage(s) from its customers on board MH flight at least a day before take off and load these baggage(s) in a container arranged by themselves as Unaccompanied Baggage.

(ii) ABDA will then pay MAS a minimum charge of RM1100 which is the rate for the pivot weight of 550 kg per container, whether or not the weight of the container is 550 kg. Any excess weight above 550 kg will be charged RM2.00 per kg.

(iii)(a) Thereafter ABDA will prepare an Airway Bill listing all their customers' baggage(s) together with a corresponding separate Cargo Manifest evidencing the Airway Bill containing the unaccompanied baggage.

(b) These documents will be presented by ABDA to the Malaysian Cargo Customs for examination and approval of the listed and specified Cargo.

(iv) These containers are then sent through Loadsheet control where the containers are then sealed and marked as "Category O" to indicate that the container is assigned for this special service. This step is also monitored by ABDA.

(v) At the Port of Destination for example in Madras, our handling agents will deliver the container, upon off-loading of the particular container to the Passenger Arrival Hall instead of the Cargo Terminal.

(c) The airway bill and the cargo manifest will be presented by ABDA to the Malaysian cargo customs for examination; and upon approval thereof ABDA will pay the usual cargo rates.

(d) The loadsheet department created a special category "O" for "unaccompanied baggage". The container that carried the unaccompanied baggage was declared to the Malaysian cargo custom as such but it will be referred merely as "baggage" in the compartment planning message (CPM) and marked as category "O" against the "unaccompanied baggage". The cargo handlers in Madras will refer to the CPM in order to identify the goods in question. Penial Kantharay Lazarus – hereinafter referred to as "Penial" (DW4), an airport manager of MAS attached to Chennai Airport, Madras, India took the stand. Under cross-examination, Penial testified to the following (see p. 94 of the notes of evidence):

Q: I suggest to you that because it has been listed under category 'O' by MAS, the unique arrangement by the plaintiff caused MAS to categorise it as 'O'.

A: Yes, YA but the CPM has got some standard codes namely 'C' for cargo, 'B' for baggage, 'M' for Mail which the CPM copied to all our handling agents.
Category 'O' which something that they would not know. It is unique to MAS. But we have to explain to the handling agent why it is marked as 'O'.
CPM meant Compartment Planning Message.

Q: In your witness statement in L 22 Q 12, you stated that you did not know the meaning of category 'O' and I ask you now?
If you did not know of category 'O', did you clarify with your area manager or even with the plaintiff's managing director ie, Jainula?

A: No, I did not contact Jainula, but I contacted the area manager who explained that category 'O' meant for other baggage.

By way of a memorandum, Ong wrote to the area managers of South India, North India and Pakistan. That memorandum was dated 22 November 1995 and it was worded in this way (see p. 16 of "D12"):

ABDA AIRFREIGHT
UPLIFT OF UNACCOMPANIED BAGGAGE
KUL-MAA/DEL/KHI

MH and ABDA Airfreight have drawn-up a contract to uplift unaccompanied baggage as cargo. Under the arrangement, the containers are sealed and listed under category 'O' in the CPM (Compartment Planning Message). You are required to request our handling agent to discharge the container(s) to the passenger arrival conveyor belt instead of (to) the cargo terminal.

MH will not be liable (for) any loss or damage (to) these shipments. Any mishandling should be directed to ABDA Airfreight representative at your respective station.

En. Zainal Abidin the Managing Director of ABDA Airfreight will be visiting your station to discuss the operation matters in greater detail. Please extend your cooperation to him to ensure the handling is smooth and efficient.

Should you have any enquiries, please refer to Cargo Manager (Orient) for clarification.

Regards.

It would be a correct assertion to make that there was no known category "O" in the airline industry and it was for the purpose of the agreement that category "O" was created by MAS.

(e) The airway bill and the cargo manifest shall not form part of the documentation that would follow the "unaccompanied baggage". These documents will not be sent to Madras at all (see pp. 8, 9, 12, and 13 of "D12").

(f) When the container that held the "unaccompanied baggage" reached Madras airport, the container would be opened and it would reveal the "unaccompanied baggage" carrying the ABDA baggage tags but with no airway bill nor cargo manifest because these documents were left behind in Kuala Lumpur. The camouflage was necessary in order to reflect, represent and to give the impression that the container containing the "unaccompanied baggage" should be discharged at the passenger arrival hall at Madras airport rather than at the cargo terminal (see pp. 8 to 13 of "D12"; see Jainula's witness statement at question and answer number 18; and Ong's witness statement at question and answer number 13).

The true intent and purport of the agreement

(1) As I said, it was an agreement dated 22 November 1995 for the purpose of the upliftment of "unaccompanied baggage" and the relevant terms can be seen at p. 14 and p. 15 of "D12" as reproduced in the early part of this judgment.

(2) As I said, the agreement encompassed and adopted in toto the operational conditions as reflected in the minutes as seen at pp. 8 to 13 of "D12".

(3) As alluded to earlier, Zainal Abidin's letter dated 25 October 1995 annexed in "D12" of p. 4 will be referred to from time to time. I must at once say that this letter was very essential and, indeed, important. It gave the perspective of the agreement between ABDA and MAS. A correspondence of this nature must surely be receivable as evidence to show the factual matrix of the whole case. That letter was certainly admissible as evidence and it was addressed to Ong and it was worded in this way:

PROPOSAL TO PROMOTE DAILY CARGO MOVEMENT KUL/ MADRAS WITH EXCLUSIVE RIGHT FOR ABDA AIRFREIGHT SDN. BHD.

With due respect, firstly, please accept our Million Tonne of THANKS and gratitude for the reinstatement of ABDA Airfreight as MAS Cargo Sales Agent. With your new leadership and guidance we are indeed already progressing towards greater achievement in all aspect(s) for (our) mutual benefit. Within two months of our reinstatement we have contributed the following revenues:

KUL/DEL/KBL	128,449.00	KGS	RM329,111.94	ON MH/FS
KUL/BKK/TAS	11,888.00	KGS	RM 18,028.80	ON MH/HY
KUL/DXB/TAS	32,234.00	KGS	RM 94,246.38	ON MH/HY
KUL/DEL/TAS	13,872.00	KGS	RM 18,775.60	ON MH/HY
KUL/DEL/ALA	20,425.50	KGS	RM 26,553.15	ON MH/HY
SIN/KUL/TAS	34,139.50	KGS	RM 33,268.29	ON MH/K4
KUL/DXB/MOW	27,732.00	KGS	RM 84,360.74	ON MH/SU
TOTAL	268,740.00	KGS	RM604,344.90	

(The above amount is only for Malaysia Airlines)

Apart from the above on going business, we are very keen to promote daily cargo movement for sector Kuala Lumpur to Madras. Due to poor belly space utilization on the KUL/MAA pax flights, ABDA Airfreight would like to propose a business partnership in promoting a special "ABDA BAGGAGE SERVICE" to improve the utilization. As we all know promoting Excess Baggage and Unaccompanied Baggage on this sector is most difficult due to the high cost and momental task and hassle at Madras Customs.

To overcome this, as well as to rescue a share of this lucrative business, our "ABDA BAGGAGE SERVICE PROGRAM" will undoubtedly encourage passengers to carry more goods during their travel at a very nominal fee. Besides the normal 20 kgs baggage allowance, we shall collect the rest of the baggage at least a day before their departure. ABDA Airfreight would buy up containers for this purpose. All preparation in preparing these containers would be our responsibility. However, with the co-operation of MAS in Madras we anticipate these type(s) of cargoes would be easily and expeditiously cleared through the local customs. We are extremely confident to uplift approximately 5-10 tons of such freight per flight after our six months probationary period.

To make this (a) SUCCESS we are committed to advertise through the local media and radio in Malaysia and Singapore. An estimated sum of approximately RM100,000 is set aside for this purpose. We shall also work very closely with the respective MAS Travel Agencies who are active in Madras sector. Hence, these service(s) are only for MAS passengers, (and) it will certainly attract other major airline passengers to travel to Madras only on MAS.

In return for our heavy investment and the time taken to develop this product, we humbly request for the EXCLUSIVE RIGHT for the period of at least two years with an extension for another year. We're prepared to pay MAS RM2.00 per kilo for the first six period of six months (probationary period) and RM3.00 per kilo (which is your market rate) for the rest of the period.

We sincerely hope this proposal will meet your kind consideration and approval. Should you need any further clarification, please do contact us. We look forward to your reply as soon as possible to enable us to launch the product by 01st January 1996. Looking forward to a mutually beneficial and fruitful business relationship.

Thanking you.

This immediately brings to mind the case of *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 FC, a decision of Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was). There his Lordship (as His Majesty then was) aptly said at p. 283 of the report:

> It has nowhere been contended that there are other documents and inferentially the guarantee sued on was the legal document containing the terms between the parties and it was executed by the respondents after acceptance by them. It must therefore be a matter for argument whether the said letter is admissible in evidence to determine the existence and the application of the terms of the guarantee having regard to the provisions of sections 91 and 92 of the Evidence Act 1950. We are of the view that the said letter does not fall within the category of negotiations as to be caught by the prohibitory provisions of the Evidence Act but gives factual background which is certainly admissible. As Lord Wilberforce said in *Prenn v. Simmonds* [1971] 3 All ER 237, 241:
>
> > In my opinion, then evidence of negotiations … ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

Echoing the same sentiments was the case of *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 FC. In that case, Mohamed Azmi FJ aptly said that "evidence of surrounding circumstances and factual background have always been admissible."

The Terminologies

The terms "accompanied baggage" and "unaccompanied baggage" have been bandied around by the parties in the course of the trial. It would therefore be ideal, at this juncture, to explain these two terminologies.

Accompanied Baggage

It is baggage which must travel with the passenger under a "baggage check" and it is widely known among airline travellers as an airline baggage tag. These baggages are called "checked baggages" and the "travel documents" for such baggages will be the "passenger ticket" and the "baggage check". A booklet entitled "General Conditions of Carriage of Malaysian Airline System Berhad For Passengers and Baggage and Cargo" compiled with effect from 1 April 1979 contained pertinent definitions of certain terminologies and that booklet was marked as exh. "P5". In exh. "P5" the following words were defined:

"Baggage" means such articles, effects and other personal property of a passenger as are necessary or appropriate for wear, use, comfort or convenience in connection with his trip. Unless otherwise specified, it shall include both checked and unchecked baggage of the passenger.

a "Baggage Check" means those portions of the ticket which provide for the carriage of passenger's checked baggage.

b "Baggage Tag" means a document issued by Carrier solely for identification of checked baggage, the baggage (strap) tag portion of which is attached by Carrier to a particular article of checked baggage and the baggage (identification) tag portion of which is given to the passenger.

c "Checked Baggage" means baggage of which Carrier takes sole custody and for which Carrier has issued a baggage check.

d "Ticket" means the document entitled 'Passenger Ticket and Baggage Check' issued by or on behalf of the Carrier and includes the Conditions of Contract and Notices and the flight and Passenger coupons contained therein.

e "Unchecked Baggage" means any baggage of the passenger other than checked baggage.

It would also be germane to refer to the Carriage By Air Act 1974, (Act 148) where the first schedule carried the following legend:

Section 2 – BAGGAGE CHECK

f Article 4

(1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph (1), shall contain:

g

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least

h one such stopping place;

(c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect

i of loss of or damage to baggage.

(2) The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, nonetheless, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph (1) (c)) does not include the notice required by paragraph (1) (c) of this Article he shall not be entitled to avail himself of the provisions of Article 22, paragraph (2).

Since this case involved air travel to India, it would be ideal to reproduce the Indian version of the Carriage by Air Act 1972. Under Chapter II of the Indian Carriage by Air Act 1972, at Part II under category "Luggage ticket", s. 4 enacts as follows:

(1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

(2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The luggage ticket shall contain the following particulars:-

(a) the place and date of issue;

(b) the place of departure and of destination;

(c) the name and address of the carrier or carriers;

(d) the number of the passenger ticket;

(e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;

(f) the number and weight of the packages;

(g) the amount of the value declared in accordance with Rule 22(2);

(h) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall nonetheless be subject to these rules. Nevertheless if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) of sub-rule (3), the carrier shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

A witness by the name of Kallianpur Gangadharan – hereinafter referred to as "Ganga" (DW6), gave a witness statement and at question and answer number 15 his evidence went like this (see encl. 24):

> Q15: How will one distinguish between 'Accompanied Baggage' and 'Unaccompanied Baggage'?
>
> A: 'Accompanied Baggage' is checked-in baggage carried under the passengers ticket and under a 'checked-in Baggage-Tag' of the carrier. These items of 'baggage' will be identified by the carrier's Baggage-Tag. The 'Unaccompanied Baggage' is carried under an Airway Bill and should be recorded in the Cargo Manifest of the flight on which it is carried. It will not have the carrier's Baggage Tag. It will have a 'Cargo Label' which will refer to the Airway Bill Number and the number of pieces covered by that Airway Bill of which that particular piece forms a part.

Jainula's evidence elicited under cross-examination at p. 20 of the notes of evidence was worded in this way:

> Q: In accompanied baggage do you need a cargo manifest and airway bill?
>
> A: No.
>
> Q: These are delivered?
>
> A: Passengers' arrival hall.

Unaccompanied Baggage

Unaccompanied baggages are baggages of passengers who travel under an airway bill and that airway bill is in turn recorded in a cargo manifest. Unaccompanied baggages attain the status of cargo where different tariffs are imposed. Cargo labels would be issued for such baggages. Evidence wise reference should be made to the witness statement of Jainula as seen in encl. 18. The question and answer number 5 would be pertinent:

> Q: What do you mean by unaccompanied baggage?
>
> A: Each passenger is entitled to a free baggage allowance of 20 kgs. For any baggage in excess of the said 20 kgs the passenger will have to pay a high premium to enable the passenger's excess baggage to be transported on the same flight as the passenger.

Under cross-examination, Jainula adverted to the meaning of "unaccompanied baggage." At p. 19 of the notes of evidence, the evidence of Jainula went like this:

> Q: Unaccompanied baggage. What is the meaning?

A: Means personal belongings of a passenger and transported as cargo, not necessarily on the same flight with him and it is delivered to the cargo terminal at point of destination.

Q: How is it normally sent? Do you issue an airway bill?

A: Yes.

At p. 20 of the notes of evidence, Jainula continued under cross-examination in these words.

Q: This airway bill is issued by the agent?

A: Yes.

Q: There will also be a cargo manifest prepared by carrier?

A: Yes.

Q: How is the unaccompanied baggage delivered?

A: To the cargo terminal.

A Sham Agreement

In my judgment, there was undisputed evidence that "unaccompanied baggage" would be delivered to the cargo terminal at the port of destination while "accompanied baggage" would be delivered to the passengers' arrival hall. It was also part and parcel of my judgment that the agreement between ABDA and MAS was independent and distinct from the sales agency agreement dated 28 September 1995. When read independently the agreement was nothing more than a mere sham. When read collectively and taken in its correct perspective the agreement was intended to give an appearance of creating between the parties rights and obligations which were different from the actual rights and obligations which the parties intended to create. In this connection, I must refer to the speech of Diplock LJ in *Snook v. London And West Riding Investments Ltd* [1967] 2 QB 786 where at p. 802 of the report, his Lordship had this to say of sham transactions:

> As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham,' it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* [1882] 21 Ch.D. 309, C.A. and *Stoneleigh Finance Ltd. v. Phillips* [1965] 2 Q.B. 537), that for acts or documents to be a 'sham,' with whatever legal consequences follow from this, all the parties

thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

Lim Beng Choon J also applied *Snook*'s case when his Lordship decided the case of *Kuppusamy Berapanas v. Anggamah Ramasamy & Anor* [1991] 2 CLJ 1540; ([1991] 3 CLJ (Rep) 97). At p. 1551 (p. 110) of the report, his Lordship rounded up the matter in these words:

> The court in order to determine whether a document or transaction is a sham ought to have regard to all the circumstances – both before and at the time of the execution of the document or creation of the transaction.

It must be recalled, in the context of the present case, that the object and intent of the agreement was to consign the excess baggages as unaccompanied baggages flying from Kuala Lumpur to Madras. The status of the excess baggages were altered to accompanied baggages upon arrival at Madras in order to avoid the discharge of the excess baggages at the cargo terminal. This manoeuvring was done in this way:

(1) By suppressing and withholding two very important import documents, namely:

(a) airway bill; and

(b) cargo manifest

from the Madras customs authorities.

(2) By having visually similar ABDA baggage tags with that of MAS baggage tags which led the authorities to assume that the excess baggages were "checked baggages" – meaning baggages with baggage tags; and consequently, by such deception the excess baggages were allowed to be discharged at the passenger arrival hall. It was argued by Mr Sri Dev Nair, learned counsel for ABDA, that this problem could be "ironed out." But, with respect, since the very purpose of the agreement was to hoodwink the Indian customs authorities, there was no room at all for further negotiations. Pure and simple, the agreement was a sham. There was deception of the Indian customs authorities that could not be "ironed out" at all. There was overwhelming evidence to show that the agreement was nothing more than a mere sham. For instance, under cross-examination, Penial's evidence went like this (see p. 109 to p. 110 of the notes of evidence):

Q: Do you agree that in all or most of the plaintiff's baggages that were sent to Madras did not have the cargo manifest and airway bill?

A: No, they did not have.

Baggages can be classified into 2 categories:

(1) certain baggage is checked in along with the passenger ticket and the ticket carries a legend 'Passenger ticket and baggage check.'

(2) Unaccompanied baggage under the airway bill. The passenger baggage tag carries a tag given by the airline. The unaccompanied baggage has got a cargo label fixed to the bag. Here in KL as per the agreement the cargo manifest is made out but kept in KL. So still it is considered as cargo.
Unaccompanied baggage will not go to the passenger terminal but to the cargo complex for clearance and this is the system in Madras.
Accompanied baggage of the passenger will be cleared at the passenger arrival and this is the system in Madras.

Q: What do you mean by cargo manifest?

A: Whatever is loaded in the belly of the aircraft is considered as a cargo. A cargo manifest is a list prepared by MAS for onward transmission to Madras just like the one at pg 34 of L 16.

Q: What do you mean by an airway bill?

A: It is just like a passenger ticket but for a cargo commodity and it is just like pg 33 of L 16.

An advocate practising in the High Court of Madras by the name of Sundram Balachandrer Sundara Raman (SBS Raman) – hereinafter referred to as "Raman" (DW5), under cross-examination testified in this way (see p. 132 to p. 134 of the notes of evidence):

Q: In the context of the agreement between the plaintiff and the defendant the passenger who uses the plaintiff's services has to declare his accompanied baggage as well as his unaccompanied baggage in the disembarkation card.

A: He has to fill but with this distinction.
In the case of accompanied baggage the passenger will have with him the baggage tag with which he can claim his accompanied baggage. If unaccompanied baggage, the passenger will have an airway bill issued by the carrier with which he can claim his baggage at the cargo warehouse complex. The accompanied baggage and the unaccompanied baggage will be claimed at two different places. The accompanied baggage will be claimed at the passenger arrival hall whereas the unaccompanied baggage will be claimed at the cargo warehouse complex.

Q: Do you agree that the disembarkation card is a declaration by the passenger of the number of baggages he is carrying?

A: The disembarkation card is the declaration with regard to the number of pieces only. The modality for clearing accompanied and unaccompanied baggage is totally different. Clearing will be through customs.

Q: In the context of the agreement, I suggest to you that there can be no misdeclaration by the passenger when he declares in the disembarkation card the accompanied baggages as well as the unaccompanied baggages, do you agree?

A: I do not agree for this reason:

The accompanied baggage is carried under a baggage tag issued by MAS – the Airline carrier. The unaccompanied baggage is carried under an airway bill in which ABDA is the consignor and ABDA is the consignee. At page 33 of L 16 it shows the consignor as ABDA at Kuala Lumpur and the consignee is ABDA at Madras.

See top page 33 of L 16 the word 'Shipper' refers to 'consignor'. Upon arrival at Madras, the consignment carried under this airway bill can only be cleared by the consignee ABDA at the cargo complex and not by some passenger at the passenger arrival hall.

The further complication is under the baggage rule which applied at the relevant time, no duty free allowance was available for unaccompanied baggage. ABDA the consignee will have to clear this shipment after filing with customs a baggage declaration form declaring the value and contents of all items available under the shipment will have to be declared by the consignee ABDA. This shipment will only be cleared through customs after duty has been paid.

At page 33 of the airway bill, the party responsible for filling up this document is ABDA Airfreight Sdn Bhd.

The Airway Bill forms part of the carrier's airway bills stock held by the authorised agent and/or issued by the carrier themselves and the particulars filled up by the shippers namely ABDA Airfreight Sdn Bhd or under the shippers' instruction.

Ganga's evidence, under cross-examination, sounded like this (see p. 163 to p. 164 of the notes of evidence):

Q: Looking at pg 20 of L 16 at para 3 the plaintiff had in fact informed the Commissioner of Customs that this unaccompanied baggage will be carried to New Delhi/Madras as checked in baggage in Malaysia airline in which the owner/passenger is travelling and flowing from this I suggest to you that it would represent to the Commissioner of Customs that there was no necessity of a cargo manifest as well as an airway bill. Do you agree?

A: My Lord, accompanied baggage is a baggage which a passenger surrenders to the airline at the time of his checking in for the flight. The airline will accept the baggage and fix a baggage tag and take over the baggage for loading into the aircraft. The passenger will be given a baggage checked for identification of his baggage at the destination. This

> is called accompanied baggage. The accompanied baggage is the one checked in by the airline whereas unaccompanied baggage will not be taken over by the airline at the time of checking in of the passenger. The unaccompanied baggage is taken as cargo by the airline against an airway bill since unaccompanied baggage is cargo covered by airway bill it is required to be mentioned in the cargo manifest.

The sum total of all these evidences would be this. That excess baggages were consigned by ABDA under the guise of it being unaccompanied baggages but the consignment of these excess baggages were being delivered to the passenger arrival hall at Madras under the guise of it being accompanied baggages since the excess baggages were tagged with ABDA baggage tags which were visually similar to the baggage tags used by MAS. Here, when the excess baggages landed on Indian soil, no proper authorised documents were available. This was my judgment and I so hold accordingly.

ABDA's Obligations To Ensure Compliance With The Law

The stand of MAS was quite clear. At para. 4(b) of the statement of defence (see p. 19 of "D11"), MAS categorically stated that:

> the plaintiff (referring to ABDA) shall arrange for the said cargo to be cleared at the destinations through the passenger terminal instead of the cargo terminal and in this connection, all handling of the said cargo and the obtaining of the requisite permissions and clearances from the authorities including the customs shall be undertaken by the plaintiff (referring to ABDA).

At para. 15 of the statement of defence (see p. 23 of "D11"), MAS put the blame entirely on ABDA:

> Further the defendant (referring to MAS) avers that the plaintiff (referring to ABDA) in not obtaining the requisite permission of the relevant authorities as referred to in paragraph 4 of the Statement of Defence, are in breach of their obligations and/or implied obligations and consequently this claim against the defendant (referring to MAS) is misconceived and untenable.

In simple language, MAS pleaded that ABDA had represented that they would obtain all the requisite permissions and approvals under the agreement. At any rate, it can be implied that ABDA had to fulfil these obligations under the agreement. The operational conditions as set out in the minutes at p. 7 to p. 13 of "D12" showed that ABDA had the unenviable task to be "wholly responsible for any discrepancy" in Madras. It was also undisputed and in fact ABDA admitted that it was the shipper and the consignor of every consignment of excess baggage uplifted as unaccompanied baggage under the agreement in Kuala Lumpur. Such admission was amply borne out in Zainal Abidin's letter dated 25 October 1995 as reproduced somewhere in this judgment.

It is said that a shipper, just like ABDA, is obliged to comply with all the laws, regulations and customs of the governments at both the ports of departure and destination. It is an obligation that must be fulfilled.

Under the agreement, ABDA knew and was aware that it was obliged to secure all the requisite permissions and approvals at Kuala Lumpur and Madras. Jainula was familiar with exh. "P5" as can be seen at p. 16 of the notes of evidence. In that situation, Jainula too must be aware of the contents of exh. "P5" especially under the caption: "Conditions of Carriage" – Cargo, where under art. VI under category of "Consignments In Transit", the side note carried this legend: "Compliance with Government Requirements." It is appropriate, at this juncture, to reproduce art. VI since ABDA would be bound by it:

> 1. (a) The shipper shall comply with all applicable laws, customs and other government regulations of any country to, from, through or over which the cargo may be carried, including those relating to the packing, carriage or delivery of the cargo, and shall furnish such information and attach such documents to the airway bill as may be necessary to comply with such laws and regulations. Carrier shall not be obliged to inquire into the correctness or sufficiency of such information or documents. Carrier shall not be liable to the shipper or any other person for loss or expense due to shipper's failure to comply with this provision.
>
> (b) No liability shall attach to Carrier if Carrier in good faith reasonably determines that what it understands to be the applicable law, government regulations, demand, order or requirement requires that it refuse and it does refuse to carry a consignment.

The stand of MAS was quite simple. That it was ABDA that had breached the agreement. Under cross-examination, Ibrahim @ Tuan Ibrahim bin Abdullah – hereinafter referred to as "Ibrahim" (DW3), confirmed that ABDA had breached the agreement. At p. 78 of the notes of evidence, the testimony of Ibrahim went like this:

> Q: I suggest to you that the plaintiff had not breached the agreement.
>
> A: No, he has breached the agreement because we (MAS) are only the carriers of passengers and their baggages as well as cargoes.
> In the case of cargoes it is the duty of the importers to obtain the necessary permits and approvals like that of the passengers who are responsible to ensure that they have valid travel documents and visas. The airline merely provide(s) the transport. However, our concern about asking the plaintiff to show us the approval from Madras customs was because we are equally liable for any fines and we may even have our aircraft impounded for the offence by the Madras authorities.

To be fair to ABDA, there was evidence to show that ABDA sought for the necessary permissions and approvals from the relevant authorities in Kuala Lumpur – the port of departure (see pp. 17 to 19, pp. 20 to 21, and pp. 24 to 26 of "D12"). But unfortunately, ABDA did not make any attempt to comply with the Indian laws. There was no evidence to show that ABDA sought for the approvals and permissions of the relevant authorities in India – the port of destination. ABDA through Mr Sri Dev Nair sought to justify the propriety of the agreement by referring to two letters as seen at p. 48 and p. 49 of "D12". The first letter at p. 48 of "D12" was dated 15 April 1996 and it was from the International Civil Aviation Organization ("ICAO") with an address at number 1000 Sherbrooke Street West, Suite 400, Montreal, Quebec, Canada and that letter was worded in this way:

To: Mr. Zainal Abidin Bin
Abdul Kapur
Managing Director
Abda Airfreight SDN. BHD.
Selangor Darul Ehsan
West Malaysia

Upliftment of 'unaccompanied baggage'
ICAO Annex 9, Standard 4.53

Dear Mr. Zainal Abidin,

In response to your fax dated 12 April, the procedure you describe – whereby excess baggage uplifted under air waybill on the same flight as the passenger owner can be cleared in the baggage hall at destination – would be fully consistent with the letter and intent of Annex 9, Standard 4.53.

It should be noted that the decision to allow such simplified baggage clearance and delivery is at the discretion of the customs authorities in the destination State. Provided an agreement can be reached with the airline and the customs authorities regarding appropriate charges and documentation, and appropriate security measures are applied, the proposed simplified procedure is supported.

Sgd. (Illegible)
Mary K. McMunn
Chief, Facilitation Section

The second letter can be seen at p. 49 of "D12" and it was dated 17 April 1996. This second letter was from ICAO's regional office for Asia and Pacific with an address at P.O. Box 11, Samyaek Ladprao, Bangkok 10901, Thailand and it was worded in this fashion:

To: Mr. Zainal Abidin
Managing Director
ABDA AIRFREIGHT SDN. BHD., West Malaysia

a From: L.B. Shah, ICAOREP, Bangkok

Subject: Clearance of Unaccompanied Baggage

I acknowledge your fax ABDA/ICAO/01/01/04/96 of 12 April 1996 on the above subject.

b Annex 9 (FACILITATION) to the Convention on International Civil Aviation already makes provision for unaccompanied baggage to be cleared under the procedure applicable to accompanied baggage or another simplified procedure. The text of Standard 4.53 of Annex 9 reads:

c Unaccompanied Baggage

4.5.3 Unaccompanied baggage carried by air shall be cleared under the procedure applicable to accompanied baggage or under another simplified customs procedure distinct from that normally applicable to other cargo.

d Note - It is the intent of this provision, *inter alia*, that:

a) unaccompanied baggage, to the extent possible be as free from declaration forms as accompanied baggage; however, clearance documents provided by airlines shall be completed by the passenger prior to shipment;

e b) the same customs concessions be granted as for accompanied baggage, subject to compliance with the regulations of the Contracting State concerned; and

c) arrangements be made for the clearance of unaccompanied baggage in the passenger customs hall where selected

f accompanied baggage is cleared when necessary.

4.5.3.1 Contracting States shall make provision so that unaccompanied baggage may be cleared upon request of a person acting as an authorized representative for the owner.

g I hope the foregoing will be of assistance to you and wish you all the best in your new venture.

Best regards. for L.B. Shah

Sgd (illegible).

h But alas, the glow of these two letters from ICAO lost its luster because these two letters were dated in the month of April 1996 and it was clearly after the agreement was terminated. At any rate ICAO's letter at p. 48 of "D12" dated 15 April 1996 contained a proviso to the effect that "an agreement" has to be "reached with the airline and the customs authorities" which must

i necessarily meant in Kuala Lumpur and Madras in regard to the upliftment

of "unaccompanied baggage." It is interesting to note that Jainula under cross-examination initially said that he had complied with the regulation of the contracting state, namely, Madras but later he resiled and he said that he did not discuss nor comply with any written document from India before the agreement. In a change of heart, Jainula too confirmed that the officials from Madras did not make any provision for baggages to be cleared in the manner as envisaged under the agreement. The question and answer rigmarole at p. 26 to p. 27 of the notes of evidence would certainly bear out the waivering stand adopted by Jainula.

By way of a digression, I need to say that there is a brief write up of ICAO in a book entitled *"Air Law"* by Shawcross and Beaumont, 4th edn, vol. 1, Issue 83, March 2001. At para. 1(10) of p. 1/6 of Division 1, under category "Introduction to Air Law", the learned authors had this to say:

> International Civil Aviation Organisation
>
> (10) On 5 March 1947 the minimum number of twenty-six ratifications of the Chicago Convention (The Convention on International Civil Aviation signed at Chicago on 7 December 1944 and appended to the Final Act. See para I(4I))., was received and the convention became operative on 4 April 1947. On 6 May 1947 the First Assembly of the ICAO met in Montreal and transacted business in accordance with its regulations comprised in Chapters VII and VIII of the Chicago Convention (PICAO Document 2187, pp 51-53. As to ICAO, see further para II(2)-II(17). Thirty-six contracting states, eleven non-contracting states (observers) and seven international organisations (observers) (For lists of all states and organisations represented, see (1947) 2 ICAO Bull 6. For a retrospective view of ICAO's achievements in its first fifty years, see (1994) 49 ICAO J 7 (September issue)) were represented by delegations at this assembly. Seventy-one resolutions were adopted at the assembly and much time was occupied by the six commissions in discussing such matters as a multilateral agreement to govern commercial air transport on a 'five freedoms' basis, and a draft convention concerning the recognition of rights in aircraft (Formerly called Convention on Recordation of Title to Aircraft and Aircraft Mortgages). It was also resolved to set up a legal committee of the ICAO to absorb, and take the place of, the CITEJA. The constitution of this committee was unanimously adopted (For Constitution of Legal Committee, see Resolution AI-A6 (Appendix A)), ICAO Doc 4411, p 49-AI-P/45 of 3/6/47; see further para II(II).

and its significance cannot be doubted. But, in the context of the present case, the two letters from ICAO came too late in the day and it was of no use to ABDA at all.

Article 16 of the First Schedule to the Carriage By Air Act 1974 states as follows:

> (1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his servants or agents.
>
> (2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

and it sets out the obligations of the consignor – referring, of course, to ABDA. The obligations imposed by law on ABDA are certainly onerous. MAS, on the other hand, "will not be responsible for any claims" under the agreement. It must be borne in mind that under the agreement, ABDA was the shipper/consignor of "unaccompanied baggage" while MAS was merely the carrier of the transhipment/consignment. ABDA was not MAS's agent under the agreement. As I said, MAS was specifically excluded from any liability arising under the agreement. Everything rested on ABDA. All the responsibilities under the agreement fell on ABDA.

In regard to the issue of advertisement as envisaged under the agreement, reference should be made once again to the letter from Zainal Abidin to Ong dated 25 October 1995 which was reproduced somewhere in this judgment. The third last paragraph of that letter alluded to advertisement through the "local media and radio in Malaysia and Singapore." But the display of MAS's logo at the airport terminal against the back drop of the words "ABDA Baggage Sdn Bhd" as shown in the photograph at p. 43 of "D12" was really beyond the scope of the agreement. ABDA was not the agent of MAS for purposes of advertising the company known as "ABDA Baggage Sdn Bhd." In short, usage of MAS's logo to promote and advertise the name of the company known as "ABDA Baggage Sdn Bhd" violated the terms of the agreement (see p. 61 and p. 62 of the notes of evidence). To confound the matter further, there was no agency agreement between "ABDA Baggage Sdn Bhd" and "MAS" (see pp. 42 and 54 of the notes of evidence). In my judgment, ABDA misrepresented itself as MAS's agent under the agreement.

What Transpired In Madras Airport?

Jainula, Ong and Ibrahim were not in India when the agreement was in operation. In fact, not a single staff from ABDA was present at the "tarmac each time MAS aircraft" landed in Madras. ABDA's staff too was not posted at the Madras airport terminal. Penial – MAS airport manager at Madras, knew

what transpired at Madras airport between the period in question especially between January to March 1996. MAS put Ganga on the stand and he gave a running commentary of the modalities to be applied as soon as an aircraft docked at the Madras airport.

Ganga's credentials were quite impressive. He retired as a government servant from the government service of India. He was with the Indian customs department for approximately 34 long years. In his witness statement in encl. 24, he gave an extensive bird's eye view of the customs procedures when an international aircraft landed in Madras airport. I can do no better than to reproduce Ganga's witness statement according to its significance. The following reproduction would be very instructive:

Q6: Mr. Gangadharan, when an international aircraft comes to a halt on the tarmac at the parking bay assigned to it on landing, do Customs Officials appear anywhere near the aircraft?

A: Yes. There would be one or two officers posted at the tarmac for supervising the unloading and loading of goods and also keeping surveillance at the tarmac. Further, at times, there may be intelligence officers in civil clothes (out of uniform) present at either the tarmac or at the exit point of the aircraft (door of the aircraft exiting to aerobridge or step-ladder).

Q7: Are there any documents required to be presented to the Customs Authorities by the carrier upon landing?

A: Yes. The person in charge of the aircraft (the Captain or Commander) or the Authorised Agent of the Carrier has to submit to the Customs Officer, an Import Manifest.

Q8: What documents are contained in the Import Manifest?

A: The Import Manifest should contain the following:

General Declaration in Form 1, wherein a declaration is made by the Commander of the aircraft or the Authorised Agent of the Carrier that the statements and particulars contained in the General Declaration and the Supplementary Forms submitted therewith are complete, exact and true. The Supplementary Forms required to be submitted with the General Declaration are:

(a) The Passenger Manifest.

(b) Cargo Manifest.

(c) List of Private Properties of Captain and Crew.

The Cargo Manifest is to be submitted in separate sheets in respect of:

(a) cargo to be landed.

(b) unaccompanied baggage.

(c) goods to be transhipped.

(d) same bottom or retention cargo.

Q9: Are there any statutory provisions which require these documents being handed over to the Customs Authorities at the Airport?

A: This is required under S30 of (the) Customs Act 1962 read together with the Import Manifest (Aircraft) Regulations 1976.

Q10: What happens at the tarmac?

A: At the tarmac, goods carried by the aircraft intended for discharge at Chennai and goods intended for trans-shipment via Chennai are first off-loaded. In the case of flights terminating in Chennai with no onward destination in India as is the case with Malaysia Airlines flying Kuala Lumpur to Chennai and Chennai to Kuala Lumpur, the entire goods carried on the aircraft including baggage is off-loaded. The baggage of the passengers travelling on the aircraft which has been checked-in by them are transferred to the Passenger Arrival Hall for Customs clearance. The goods covered by the Cargo Manifest, which category includes 'unaccompanied baggage' are transported to the Air Cargo Complex under escort by a Customs Officer to be handed over to the Import Freight Officer (IFO) an Officer of Customs. The cargo intended for export to be carried on that same aircraft and the checked-in baggage of the out-going passengers are then loaded onto that aircraft.

Q11: Would hand baggage or baggage accompanying passengers as checked in baggage appear on the Import manifest?

A: No. Sec. 31(3) specifically excludes the unloading of baggage accompanying a passenger or member of the crew other than mail bags, animals, perishable goods and hazardous goods from the strict general requirement of import manifest being first delivered to Customs and order granting entry inward issued for items covered by import manifest.

Q12: Would 'unaccompanied baggage' appear on a Cargo Manifest?

A: Yes. The 'unaccompanied baggage' is required to be included in the Cargo Manifest in terms of the Import Manifest (Aircraft) Regulations 1976 read with Sec. 30(1) & (2) of the Customs Act.

Q13: Where will the unaccompanied baggage be taken?

A: All the goods covered by the Cargo Manifest will be taken to the Air Cargo Complex to be handed over to the Import Freight Officer (IFO) of the Customs and this will include the unaccompanied baggage also.

Q14: What happens to the accompanied baggage?

A: The accompanied baggage (checked in baggage) is taken to the Passenger Arrival Hall where the passengers will claim their baggage and go through Customs for clearance.

Q15: How will one distinguish between 'Accompanied Baggage' and 'Unaccompanied Baggage'?

A: 'Accompanied Baggage' is checked-in baggage carried under the passengers ticket and under a 'Checked-in Baggage-Tag' of the carrier. These items of 'baggage' will be identified by the carrier's Baggage-Tag. The 'Unaccompanied Baggage' is carried under an Airway Bill and should be recorded in the Cargo Manifest of the flight on which it is carried. It will not have the carrier's Baggage Tag. It will have a 'Cargo Label' which will refer to the Airway Bill Number and the number of pieces covered by that Airway Bill of which that particular piece forms a part.

Q16: Is there any Customs Duty levied on 'Accompanied Baggage'?

A: If the accompanied baggage contains any materials chargeable to duty as per Baggage Rules, the duty will be charged.

Q17: During the relevant period December 1995 to March 1996 was 'Unaccompanied Baggage' and 'Accompanied Checked-in Baggage' dutiable under the Customs Act?

A: Dutiable articles contained in the Accompanied and Unaccompanied Baggages are leviable with Customs Duty. Under the Baggage Rules then in force, namely the Baggage Rules 1994, there was no duty free allowance available on 'Unaccompanied Baggage'. As regards 'Accompanied Checked-in Baggage' there was a duty free allowance. This duty free allowance was not available for 'Unaccompanied Baggage.'

Q18: What are the modalities for a passenger declaring the contents and/or value of his 'Accompanied Checked-in baggage' and clearing through Customs?

A: (1) The passenger is given a Disembarkation Card on the aircraft which conforms to the laws of the port of disembarkation. So far as relates to India this card is in two parts, one intended for Immigration and the other intended for Customs.

(2) In the portion required for Customs the passenger is required to declare the number of pieces of his baggage whether accompanied or unaccompanied and including hand-baggage.

(3) After clearing immigration, the portion of the Disembarkation Card required for Customs is returned to the passenger.

(4) The passenger then collects his checked-in accompanied baggage from the conveyor at the arrival hall and presents himself before Customs.

(5) The passenger makes an oral declaration as the contents and value of his accompanied checked-in baggage and hand baggage. Usually the oral declaration of the passenger is accepted by the Customs and the passenger is cleared through Customs. In certain cases of doubt or reasonable suspicion about the *bona fides* of the passenger's oral declaration, the baggage is examined and duty levied if necessary on the value exceeding the free allowance. In the case of gross misdeclarations, concealment of contraband etc, penal action is initiated under (the) Customs Law. (Disembarkation Card tendered).

Q19: What happens to the Unaccompanied Baggage which is carried on the aircraft?

A: All goods including Unaccompanied Baggage covered by the Cargo Manifest is unloaded from the aircraft to the tarmac in the presence of Customs. This is then transported from the tarmac to the Air Cargo Complex escorted by a Customs Officer. The Airway Bills relating to all cargo including Unaccompanied Baggage and the Cargo Manifest will be handed over to the Import Freight Officer of Customs in the Air Cargo Complex. These goods are then lodged for warehousing with the International Airport Authority of India who are the custodians for air-cargo.

Q20: How does the consignee get to know about the arrival of his cargo?

A: One copy of the Airway Bill is given to the Handling Agent of the Carrier to enable them to notify the consignee. The Handling Agent will forward to the consignee a 'Cargo Arrival Notice'.

Q21: What does the consignee do on receipt of (the) Cargo Arrival Notice?

A: The consignee will on receipt of (the) Cargo Arrival Notice approach the Handling Agent and collect a 'Delivery Order'. With the Delivery Order and consignee's copy of the Airway Bill, the consignee will proceed to Customs and file a Bill of Entry in respect of Cargo or Baggage Declaration in respect of Unaccompanied Baggage.

Q22: What will this Baggage Declaration in respect of Unaccompanied Baggage contain?

A: This Baggage Declaration will contain the list of contents of the unaccompanied baggage, the date of purchase of same (in the case of electronic consumables) and value of all items in the unaccompanied baggage.

Q23: What happens after the consignee presents the 'Baggage Declaration'?

A: The Customs will advise the International Airport Authority of India to produce the concerned Unaccompanied Baggage for examination by Customs at the Customs Examination Hall. In the presence of the

consignee all items of baggage are opened and examined to verify the correctness of the Baggage Declaration.

Ganga rendered an opinion in regard to the difference in the modality adopted by the Indian Customs in clearing "accompanied checked-in baggage" and "unaccompanied baggage". This was what he said:

Q24: What Mr. Gangadharan, in your opinion, is the most significant difference in the modality adopted by Customs in clearing 'Accompanied Checked-in Baggage' at the Passenger arrival hall and 'Unaccompanied Baggage' at the Airport Cargo Complex?

A: The most important difference is that:

(1) In the case of clearing Accompanied Baggage, the Customs Officer usually verifies that the number of pieces of baggage in the Disembarkation Card and (the) number of pieces physically sought to be cleared by the passenger tally. Unless if the *bona fides* of a passenger should be in doubt, the Customs officials usually go by the declaration of contents and value orally declared by the passenger.

(2) In the case of Unaccompanied Baggage however, the passenger is obliged to file a Baggage Declaration listing the contents and value of his unaccompanied baggage and the Customs Officials are obliged to physically have such baggage opened in their presence and the contents verified against the baggage declaration to prevent the importation of banned and prohibited items and also for purposes of assessment (of the) customs duty.

Q25: Is any duty free allowance available for Unaccompanied Baggage?

A: No duty free allowance is available for unaccompanied baggage.

Q26: At what rate was Customs duty charged at the relevant time December 1995 to March 1996?

A: At the relevant time a flat rate of 150% on the value of the dutiable goods was chargeable. That is to say if the value of the goods is Rs. 1000 Customs Duty charged is Rs. 1500.

Ganga's evidence on customs procedures went unchallenged. There was no cross-examination of Ganga on these salient points and as such ABDA must be deemed to have accepted the customs procedures adopted by the Indian customs officials as enumerated by Ganga. The law on this point can be distilled from the case of *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in delivering the judgment of the Federal Court, in fine language said:

On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance

of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 N.Z.L.R. 120, 122 where Haslam J. said at page 122:

> In Phipson on *Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*, where
>
> ... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

Unhappiness prevailed at Madras airport. Air India – the handling agents in Madras airport, were most unhappy when they were directed, towards the end of February 1996, by MAS officials to despatch containers categorised as cargo in the compartment planning message (CPM) to the passenger arrival hall instead of to the cargo terminal. Penial's witness statement in encl. 22 gave the full version in this way:

Q9: In what way did this arrangement involve the handling agents Air India?

A: Since loading and unloading forms part of Ground Handling operations, I was instructed by Kuala Lumpur to ensure that the handling agents Air India deliver ABDA containers to the Passenger Arrival Hall.

Q10: Did this specific arrangement of delivering ABDA containers to the Passenger Arrival Hall run smoothly?

A: Yes it did initially but our handling agents Air India towards the end of February voiced their disapproval and discontent with the arrangement and stated that they would not dispatch such containers that are shown as cargo in the Compartment Planning Message (or CPM) to the Passenger Arrival Hall because cargo ought to be delivered and discharged only at the Cargo Terminal and not at the Passenger Arrival Hall.

Q11: What is this Compartment Planning Message (CPM) and what are the normal categories found in a CPM?

A: The CPM is a description of the identity and location of the contents of the cargo hold in the aircraft. The contents of the hold are usually categorized as: 'C' for Cargo; 'B' for Baggage & 'M' for Mail.

Q12: What do you understand by category 'O' of the CPM?

A: I am sorry I do not know the definition of category 'O'. I encountered this 'O' category for the first time with ABDA Baggage.

Air India, was quite riled when they were directed to discharge containers containing unaccompanied baggage to the passenger terminal hall when the containers were covered by a cargo manifest. Penial was summoned by Air India airport manager and he was shown the Indian customs standing orders as per p. 31 to p. 32 of encl. 16 and he too was queried as to the propriety of discharging unaccompanied baggage at the passenger terminal hall. Nevertheless these containers were discharged at the passenger terminal hall because there were insufficient documents for these containers to be unloaded at the cargo terminal. In this regard, Penial's witness statement in encl. 22 makes for an interesting reading material:

Q23: Did you face any similar discrepancies in this arrangement other than the flights on 22nd and 25th February 1996 already mentioned by you?

A: On 1st March 1996 our flight arrived at Madras with a Cargo Manifest including ABDA items. The Cargo Manifest arrived on the same flight. When expected to discharge these items covered in Cargo Manifest at Passenger Arrival Hall, the handling agents took this very seriously especially in the light of their earlier objections. They reported this kind of activity by MAS to the Airport Manager of Air India. I was summoned by him and informed that such cargo being discharged at Passenger Terminal is in violation of Customs Regulations. He referred me to the Customs Standing Orders which apply. I had to use my good offices with him to keep him from reporting MAS to the Customs Authorities or taking any formal action.

On numerous occasions, Madras customs officers queried Penial in regard to the similarity of the baggage tags on one flight. When confronted Penial gave all sorts of excuses. At p. 105 to p. 106 of the notes of evidence, the following was recorded:

Q: I suggest to you that there is no similarity of the baggage tag between MAS and ABDA. Do you agree?

A: I disagree because if the passenger has for example 2 pieces of ABDA baggages and 2 pieces checked in through MAS counter, and is proceeding to the customs table in Madras, the customs officer looks at the 4 baggages and on closer scrutiny will see 2 ABDA tags handwritten with flight numbers and dates and 2 MAS tags with the passenger's name record and detail incorporated in computer print and the customs officer will say:

You are coming from KL, and yet 2 different tags.

And the customs officer will then call the airport manager MAS airline ie, myself and will seek an explanation from myself and I will mention that it is a form of excess baggage and it comes out from the same aircraft and I will be summoned like this at least 15 to 20 times at night.

On being summoned by the airport manager of Air India in Madras, Penial was quite apologetic. The confrontation went like this (see p. 105 of the notes of evidence):

> Q: Did the airport manager of Air India in Madras summon you in Madras in regard to the arrangement between MAS and ABDA?
>
> A: Yes, I was summoned after the incident of cargo manifest of MH 180 surfaced and he said:
>
> 'What is this, on one side cargo tag on the other side baggage' and I replied:
>
> I have to keep my superiors in KL informed and I asked him to give me sometime, and not to report it to the customs authorities.

Penial even went to the extent of pleading with Air India and the Indian customs authorities not to formally pursue the matter further. The transcript at question 21 of Penial's witness statement and the answer thereto should be referred to. It reads as follows:

> Q21: What form did these objections by the handling agent Air India and the Customs Authorities take?
>
> A: I managed to prevail upon the various officers not to place anything on record by way of written complaint to any authority before I had an opportunity to clarify matters with my superior officers. So these objections remained for the time oral objections. But the handling agents and (the) customs authorities made it clear to me that this kind of activity of unloading cargo at passenger arrival hall would not be tolerated.

Fortunately, all the objections and queries were made orally and Penial was busy contacting his superiors in order to keep them abreast of the latest development. At question 22 of Penial's witness statement, he was asked as to the steps taken by him and his reply was couched in this manner:

> Q22: What steps did you take after this?
>
> A: I was rather concerned that if this information were to be officially followed up by the Handling Agents and (the) Customs Officials, MAS would have to face serious consequences. I therefore tried to get in touch with my immediate superior Encik Darman but I was unable to contact him and the only available senior manager who would be in a position to advise me on the steps I should take was Tuan Ibrahim. I had communicated these incidents to Tuan Ibrahim through the 'OUS' which is similar to an e-mail within the airline and also took the opportunity to inform him of the objections and queries from the handling agent and airport authorities.

Penial's witness statement from question 28 onwards must be referred to. For completeness, I will reproduce them forthwith:

Q28: Did ABDA have any representative at Madras airport to coordinate with the authorities or clarify the queries they raised or assist you in making the clarifications?

A: No. ABDA had no staff or representative at Madras to explain or justify this arrangement under which Cargo was being discharged as Baggage at (the) Passenger Arrival Hall.

Q29: Was there any action taken by Kuala Lumpur thereafter?

A: By telex dated 4th March 1996 I was informed that the arrangement had been suspended with immediate effect and was instructed not to discharge such containers at (the) Passenger Arrival Hall in the future.

Q30: Please see Page 5 of the Supplementary Bundle L17 and say if this (is) the copy of (the) telex you received from MAS Kuala Lumpur?

A: Yes.

Q31: Did any containers containing ABDA baggage arrive from Kuala Lumpur after this?

A: No.

Q32: Are you aware of any permission or clearance given by (the) Customs Authorities for such arrangement?

A: No. If there was any official permission or clearance for such arrangement, I would not have been hauled up by (the) Madras Customs Authorities and (the) Handling Agent's Airport Manager.

That constituted the evidence of Penial which went a long way in favour of MAS. But Mr Sri Dev Nair for ABDA took exception to the evidence of Penial. It was submitted that the evidence of Penial in regard to what took place at Madras airport towards the end of February was "a farce and far fetched as nothing (had) been documented." It was also submitted that the evidence of Penial was inconsistent and that Penial was blowing "hot and cold" when he could not confirm that there were "53 flights arising out of the agreement" yet Penial, so it was submitted, could remember what the Indian customs officers had said. With respect, there was hardly any force behind these arguments. Mr Saranjit Singh was right when he submitted that a lawyer could clearly remember what was said when the lawyer was chided by the court in the course of the trial but the lawyer could rarely remember the number of objections taken by his opposing counsel. At any rate, as far as documentation was concerned reference should be made to p. 4 of the

supplementary bundle of documents marked as encl. 17 where Penial whose full name is Penial Kantharay Lazarus sent a message dated 3 March 1996 captioned:

> DARMAN/LAZARUS CPY MURAT/T IBRAHIM/DENZIL
> SUBJ: UNACCOMPANIED BGGE RESTORED AS CHK-IN BGGE AT MAAAP

and in that message Penial requested, *inter alia*, for the following course of action:

> CUD WE SEEK YR ASSISTANCE TO RQST CGO NOT TO FWD SUCH BGGE W/OUT SEPARATE MARKINGS IN EACH BGGE N ALSO THAT ALL DOCS ARE FWDD ON SAME FLT STP.

The response came and it was captioned in this way (see p. 5 of encl. 17):

> LAZARUS/DARMAN CY FEISAL/T IBRAHIM/JJONG/YUNUS/MURAT.
>
> SUBJ: BAGGAGE ACCEPTED AS CGO BUT DELIVERED TO ARR HALL AS CHK-IN BAG AT MAAP – ABDA AGT.
>
> FTHR TO MY MTLXS ON SUBJ N HDQ FEMH/032332 CMA PLS NOTE THAT THE ARRGMT HAS BEEN SUSPENDED WITH IMMEDIATE EFFECT STP SHD U CONTINUE TO RECV SUCH SHIPMNT CMA PLS DO NOT SEND IT TO THE ARR HALL FOR CUSTOM CLEARANCE STP HDQFE/KULFZ: PLS ENSURE THAT THE AWBIS RAISED N SEND ON THE FLT AS THE BAGS WILL NOT BE SENT TO THE ARR HALL BUT WILL BE FWD TO CARGO CLEARANCE AREA IF ABDA INSIST ON CONTINUING THE PRACTISE STPPLS ACK N KEEP ME UPDATED ON SITUATION STP RGDS.

The messages alluded to above were all documented and so it was erroneous to say that there was no documentary evidence to augment the oral testimony of Penial. It was also erroneous to submit that oral evidence unsupported by documentary evidence was of no significance. In my considered view, oral evidence would in the circumstances of the present case be considered as the "best evidence." Section 59 of the Evidence Act 1950 enacts as follows:

> All facts, except the contents of documents, may be proved by oral evidence.

and it simply enacts a sound legal principle. Evidence must necessarily include "all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry, such statements are called oral evidence." In *Public Prosecutor v. Sanassi* [1971] 2 MLJ 198, 200-201, Sharma J (as he then was) succinctly said:

> In order to constitute 'evidence' as defined in section 3 of the Evidence Ordinance an oral statement made to the court has to be by a 'witness'. A

witness can only give evidence from the witness box and not from the dock or elsewhere.

Mudie J in *Kurup v. Public Prosecutor* [1934] MLJ 17, 19, in the same context, had this to say:

The definition of 'Evidence' and 'Court' in section 3 of the Evidence Ordinance shows that evidence is the testimony of witnesses in a Court or before a person legally authorized to take evidence.

There is another section in the Evidence Act 1950 that merits mention. It is s. 119 and that section provides that the evidence of a witness who is unable to speak and given in any intelligible manner, as, for example, by writing or by signs shall be deemed to be oral evidence. It is a correct statement of the law to say and I so say that oral evidence is by itself sufficient to prove a fact in the absence of documentary evidence to support it. Indeed in *STU v. The Comptroller of Income Tax* [1962] 28 MLJ 220, 221, Tan Ah Tah J (as he then was) observed:

In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it, however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit, does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view, be accepted.

In *Bhojraj v. Sita Ram and Others* [1936] PC 60, Lord Roche at p. 62 remarked that:

The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. Here the plaintiffs' main evidence was consistent with itself and in many respects now stands unchallenged.

There was nothing inherently improbable in regard to the evidence of Penial (*Public Prosecutor v. Mohamed Ali* [1962] 28 MLJ 257). In his capacity as MAS airport manager in Madras, Penial was in a better position to testify as to what actually happened at Madras airport. There was no glaring discrepancy in the evidence of Penial that was sufficient to destroy his credibility. There was however minor lack of recollection but that was not sufficient to relegate Penial's evidence to oblivion. No witness in the world can give a perfect summary of the evidence while that witness is in the witness box unless of course that witness is tutored. Some witnesses take the stand and give evidence

by rote or learn by heart but nonetheless give a true story of what actually transpired. Gill J in *De Silva v. Public Prosecutor* [1964] MLJ 81, 83 rightly observed that:

> Discrepancies and contradictions there will always be in any case. In considering them what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless or untrustworthy.

Charles Ho J in *Mohamed Alias v. Public Prosecutor* [1983] 2 MLJ 172 laid down the correct approach in tackling discrepancies. This was what he said:

> In considering the discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and the demeanour.

Wan Yahya J in *Pie bin Chin v. Public Prosecutor* [1985] 1 MLJ 234, 235 had this to say of discrepancies generally:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly toothcombed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

The candour on the part of Penial can never be doubted. When Penial was asked as to why there was no documentation, he said under cross-examination at p. 108 of the notes of evidence that:

> ... if I put that in writing or in the form of a telex and it falls into the wrong hands I would be in serious trouble.

Under re-examination, Penial was asked the following question (see p. 112 and p. 113 of the notes of evidence):

> Q: You said in examination-in-chief and cross-examination that you had complaints from handling agents and queries from customs authorities in Madras and you had 10 up to 20 complaints a day, and did you not see it fit to be recorded and transmit it to KL for their information?

and he ventured an answer in this way:

> A: I call Tuan Ibrahim by OUS ie, by my company's system and there is nothing forthcoming from KL.
> Unaccompanied baggage booked as cargo still kept coming. On 1.3.96 the cargo manifest surfaced and at the same time I was queried by the

> staff of Air India who handled the aircraft and they then handed to the Madras airport manager ie, their handling agent and I was hauled up by the latter. And I sent out a telex to Encik Darman and I did not put in my humiliation I went through because we already knew that it was cargo and we were off loading such cargo in the passenger arrival hall. The 1st person under investigation by the customs of Madras if this had come out to them would have been me. And if customs had retraced the number of times that these have been going on our aircraft would have got impounded. I had to use my good office to handle handling agents not to reveal it to the customs. Further if I had put everything in the telexes, if that telex leaves my office, I will still be in trouble YA. I went through a bad time.

The salutary remarks of Raja Azlan Shah FJ (as His Majesty then was) in *Public Prosecutor v. Datuk Haji Harun Bin Haji Idris (No 2)* [1977] 1 MLJ 15, 19 must be put in the forefront when considering the evidence of Penial. This was what His Majesty said:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a note book and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all.

Taken in its right perspective there was nothing inherently improbable about the evidence of Penial. He was the man of the hour. He was present at Madras airport and he was in a position to testify as to what had actually happened. He was not describing an episode about the "cow jumping over the moon" – to borrow the words of Thomson CJ in *Public Prosecutor v. Mohamed Ali (supra)*, but rather he was describing the events that transpired at Madras airport. He described as to what he saw and heard. It was a display of oral evidence at its best. ABDA had only one witness to its credit and that was Jainula. It must be recalled that Jainula was not at Madras airport during the pendency of the agreement. In fact, Jainula was never in India at the material time. Thus, it was not surprising that nothing was "put" to Penial in the course of his cross-examination. The flow of Penial's evidence was quite smooth. It was part and parcel of my judgment and it was my finding of fact that the evidence of Penial was inherently probable and I must accept his evidence as the gospel truth.

Termination Of The Agreement

ABDA was most unhappy that MAS terminated the agreement unilaterally and without assigning any reason for doing so. MAS, on the other end of the scale, held the view that the agreement was lawfully terminated.

In my judgment, MAS was perfectly entitled to terminate the agreement without even assigning any reason. There is an array of authorities which says that if one party alleges a breach of contract for the wrong reason or for no reason at all, that party may yet justify the termination if there were at the time facts in existence which would have provided a good reason. It would be sufficient for this exercise to cite the following authorities for that simple proposition of the law:

(1) *Ridgway v. Hungerford Market Co* [1835] 3 A. & E. 171;

(2) *Taylor v. Oakes, Roncoroni & Co* [1922] 127 L.T. 267, 269;

(3) *British And Beningtons Ltd v. North Western Cachar Tea Company, Limited* [1923] A.C. 48, 71; and

(4) *Universal Cargo Carriers Corporation v. Citati* [1957] 2 QB 401, 445, [1957] 2 All ER 70, 89.

Bluntly put, when MAS gives no ground for the termination of the agreement, MAS, may generally speaking, rely on any ground available at the time of the termination. In *British And Beningtons Ltd v. North Western Cachar Tea Company, Limited (supra)*, Lord Sumner writing a separate judgment for the House of Lords had this to say (see p. 71 of the report):

> I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial.

In *Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH The Mihalis Angelos* [1970] 3 WLR 601, 609, Lord Denning MR writing a separate judgment for the Court of Appeal and after examining the facts said:

> The first point arises on the clause by which the charterers said that the vessel was 'expected ready to load …. about July 1, 1965.' The charterers said that this was a condition of the contract: and that it was broken because the owners had no reasonable grounds for any such expectation. The arbitrators found that on May 25, 1965, the owners could not reasonably have estimated that the Mihalis Angelos could or would arrive at Haiphong about July 1, 1965.' The charterers did not take this point on July 17, 1965, when they cancelled the

charter. They put it on the ground of force majeure. But the owners admit that, if this point is a good one, the charterers can rely on it. The fact that a contracting party gives a bad reason for determining it does not prevent him from afterwards relying on a good one when he discovers it: see *British & Beningtons Ltd. v. North Western Cachar Tea Co. Ltd.* [1923] A.C. 48, 71-2, per Lord Sumner.

So much for the law. It is so interesting that I could go on ad infinitum.

Now, MAS terminated the agreement by letter dated 16 March 1996 and the termination was worded in this way (see p. 28 of encl. 15):

Encik Zainal Abidin
Managing Director
Abda Airfreight Sdn Bhd
26-B2 Jalan SS6/3
47301 KELANA JAYA

Fax: 7038312

Tuan

ABDA BAGGAGE BUSINESS

Surat tuan bilangan ABDA/MAS/003/03/96 bertarikh 11hb Mac 1996 yang dialamatkan kepada Pengarah Urusan kami adalah dirujukkan.

Setelah dipertimbangkan, dukacita dimaklumkan bahawa kami tidak bercadang meneruskan pengangkutan 'excess baggage' sebagai kargo.

Sekian dimaklumkan.

Yang benar

t.t.
TUAN IBRAHIM BIN TENGKU ABDULLAH
Naib Presiden Cater dan Kontrak
Penerbangan Malaysia

s.k. Pengarah Kargo
Penerbangan Malaysia
Lapanganterbang Sultan Abdul Aziz Shah
Subang
SELANGOR

MAS contended through Mr Saranjit Singh that towards the end of February 1996, various problems surfaced in Madras and these problems were brought to the attention of ABDA. But these problems pertaining to:

(1) the discharging of unaccompanied baggage at the passenger arrival hall;

(2) the baggage tag problems; and

(3) the existence of ABDA's counter at Subang causing confusion,

were not addressed satisfactorily by ABDA. It was certainly wrong for Mr Sri Dev Nair to submit that ABDA was in the dark as to the reasons for the termination of the agreement. In my judgment, on the available evidence ABDA knew the reasons for the termination of the agreement and it was not open to ABDA to approbate and reprobate. All the three problems alluded to earlier were "live" problems that were known to ABDA when the agreement was suspended in early March (see p. 30 of encl. 15 which was a letter from ABDA dated 11 March 1996 addressed to MAS). After the termination of the agreement, ABDA wrote a letter of appeal to MAS as can be seen at p. 44 of encl. 15. That letter of appeal was dated 25 March 1996 and at p. 46 of encl. 15 there was this passage which was worded in this way:

> ... bahawa operasi ABDA baggage (referring to the unaccompanied baggage) mempunyai beberapa kekeliruan yang agak bercanggah dengan system yang sedia ada ... .

and it clearly showed, on the balance of probabilities, that ABDA knew and had knowledge of the reasons or grounds for the termination of the agreement. Furthermore, in that letter of appeal, ABDA generously employed the word "cargo", yet when Jainula took the stand he vehemently denied that the unaccompanied baggage was "cargo". At p. 24 of the notes of evidence, Jainula's testimony went like this:

> Q: Would you agree if Madras authorities were aware that container of baggage was sent as cargo but no clearance was obtained from them to deliver and discharge the said container at passenger hall it will violate custom regulations in India?
>
> A: Yes, if it is cargo but mine is not cargo.

In my judgment, it was not an afterthought on the part of MAS when it held the view that the agreement violated the Indian customs law. Surprisingly, Jainula readily agreed under cross-examination that in the event the agreement violated any law or regulation at the port of destination, MAS was entitled to terminate the agreement. At p. 34 of the notes of evidence, the transcript was recorded in this way:

> Q: Would you agree MAS could terminate the arrangement if found to contravene (the) (law) and regulation of (the) port of destination.

A: Yes.

and it certainly tied the neck of ABDA, so to speak, to the noose.

The Agreement Was Void Under The Law

In the Malaysian context, I must refer to the Contracts Act 1950 (Act 136) particularly to two sections – namely, ss. 24 and 25 thereof. Section 24 of the Contracts Act 1950 (Act 136) enacts as follows:

24. What considerations and objects are lawful, and what not.
The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.
In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

ILLUSTRATIONS

(a) A agrees to sell his house to B for $10,000. Here, B's promise to pay the sum of $10,000 is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the $10,000. These are lawful considerations.

(b) A promises to pay B $1,000 at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A $1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay $1,000 to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay $1,000 to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code.

While s. 25 of the same Act enacts as follows:

25. Agreements void if considerations and objects unlawful in part.

If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

ILLUSTRATION

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of $10,000 a year. The agreement is void, the object of A's promise and the consideration for B's promise, being in part unlawful.

That the agreement was said to be void for illegality and frustration was clearly set out in para. 13 of the statement of defence. It was framed simply as:

13. The Defendant further avers that in the circumstances and in any event, the said Agreement and the further performance of the same, is void and/or unenforceable for *inter alia* illegality and/or frustration of contract.

Now, in so far as illegality is concerned, s. 24(e) of the Contracts Act 1950 (Act 136) must be referred to. That provision is worded widely and throws its net wider. It refers to a contract whose consideration or object is immoral or opposed to public policy and it extends to statutory illegality. Both s. 24(a) and s. 24(b) of the Contracts Act 1950 (Act 136) would definitely trigger the issue of illegality quite freely (*Koh Kim Chai v. Asia Commercial Banking Corp Ltd* [1981] 1 MLJ 196; and *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v. Dato' James Ling Beng King* [1989] 2 CLJ 244; [1989] 2 CLJ (Rep) 658). I would even venture to say that s. 24(e) of the Contracts Act 1950 (Act 136) would even extend to those category of contracts which would be illegal under the common law. Local authorities that considered s. 24 of the Contracts Act 1950 (Act 136) are quite plentiful. I will name a few of them. For starters, reference should be made to the case of *Ng Siew San v. Menaka* [1973] 2 MLJ 154 which was affirmed in [1977] 1 MLJ 91 – where the court there held that a breach of the Moneylenders Ordinance fell within the purview of s. 24(a) of the Contracts Act 1950 (Act 136). This would be followed by the case of *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 at 22 where it was held that a breach of conditions under the National Land Code 1965 fell within the ambit and purview of s. 24(b) of the Contracts Act 1950 (Act 136). Next, it would be the case of *Hopewell Construction Co Ltd v. Eastern & Oriental Hotel (1951) Sdn Bhd* [1988] 2 MLJ 621 where the court considered s. 24(b) of the Contracts Act 1950 (Act 136) in the context of an alleged contravention of the Companies Act 1965. This would be followed by the case of *Amalgamated Steel Mills Bhd v. Ingeback (Malaysia) Sdn Bhd* [1990] 1 CLJ 750; [1990] 1 CLJ (Rep) 576 where the court considered the contravention of the Stamp Ordinance in the context of s. 24(a) of the Contracts Act 1950 (Act 136) and the court also considered s. 24(e) of the Contracts Act 1950 (Act 136) in relation to the common law rule in regard to the defrauding of the revenue. Next, it would be the case of *Marble Terrazzo Industries Sdn Bhd v. Anggaran Enterprise Sdn Bhd* [1991] 1 CLJ 109 where the court held that the contravention of the National Land Code 1965 fell within the scope of s. 24(a) of the Contracts Act 1950 (Act 136). Finally, reference should also be made to the case of *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 where the court held that contravention of the tax law came within the scope of s. 24(b) of the Contracts Act 1950 (Act 136). That great judge by the name of Hashim Yeop A Sani CJ (Malaya) in the course of delivering the judgment in the case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 observed that:

> paragraphs (a), (b) and (e) of section 24 of the Contracts Act, 1950 should be read disjunctively. Section 24 of the Contracts Act, 1950 is explicit and that if an agreement is forbidden by law or prohibited by law or of such a nature

> that it would defeat the law, that agreement is unlawful and void. If the agreement is prohibited by law or forbidden by law or of such a nature that it would defeat the law then the question of public policy does not arise at all. The question of public policy arises only in paragraph (e) where the court considers an agreement to be immoral or otherwise opposed to public policy.

To be valid a contract must be legal. Legality gives validity to a contract. If a contract is designed to do something illegal, that contract can be said to be invalid and unenforceable. Whereas void contracts are not invalid – pure and simple they are simply unenforceable at law.

The case of *Re Mahmoud and Ispahani* [1921] 2 KB 716 is a classic example of an illegal contract. Briefly, the facts in that case may be stated in this way. An order that was made on 19 June 1919 under the defence of the Realm Regulations (UK) provided that "a person shall not ... buy or otherwise deal in, ... linseed oil ... except under licence." The plaintiff, who had a seller's licence, contracted to sell a quantity of linseed oil to the defendant in the mistaken belief that he had a buyer's licence. The defendant later refused to accept delivery and, when sued, protested that the contract was prohibited by the order and was therefore invalid and unenforceable. It was held that the order, in clearly and expressly prohibiting unlicensed contracts of sale, expressly prohibited the contract involved in this dispute. Consequently, it was held that the contract was illegal and unenforceable. The court too held that neither party had acquired any rights under it and the court ruled that the seller's action must fail.

But not all statutes are clearly worded as the order that appeared in the case of *Re Mahmoud and Ispahani*. Yet another case would be the case of *Cope v. Rowlands* [1836] 2 M & W 149; 150 ER 707. That was a case where a United Kingdom statute provided that brokers in the city of London had to be licensed or be fined to the tune of 25 pounds. The plaintiff, an unlicensed broker, performed work for the defendant and sued for his unpaid fee. The defendant took the point and argued that the contract was illegal and unenforceable because the statute, in penalising the behaviour, was really intended to prevent unlicensed broking contracts and therefore impliedly made them illegal. It was held that the fee was not recoverable. The legislation was aimed at protecting the public by ensuring that only those who had passed through the licensing process could act as financial intermediaries. Consequently, the court held that broking contracts negotiated by unlicensed persons were impliedly prohibited. Parke B at p. 159 and at p. 710 to p. 711 said:

> The legislature had in view ... the security of the public in those important transactions which are negotiated by brokers. The clause ... must be taken ... to imply a prohibition of all unadmitted persons to act as brokers, and

consequently to prohibit by necessary inference all contracts which such persons make ... for so acting.

Both these two cases – *Re Mahmoud and Ispahani (supra)* and *Cope v. Rowlands (supra)* are classic examples of contracts that were illegal as formed. In both these two cases, the contracts by themselves were expressly or impliedly forbidden. For this very reason, the contracts were not enforceable.

I pause here for a moment. I wish to make the following observations:

(1) The court will always look to the substance and not the form of the transaction in ascertaining whether or not there has been an express or an implied prohibition of the contract (see *Siow Kwang Joon v. Asia Commercial Finance (M) Bhd* [1996] 3 MLJ 641 at 642 for the distinction between express and implied prohibition; see also the following cases for this simple proposition of the law: *Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200; *Tong Kheng Bros (M) Sdn Bhd v. Anuarul Aini bin Mohd Perai* [1990] 2 CLJ 715; [1990] 3 CLJ (Rep) 292; and *Idris bin Haji Mohamed v. Ng Ah Siew* [1935] MLJ 257). The same approach should be adopted when one is dealing with the question of illegality at common law. In the past, judges would not tolerate any contract that was injurious to society. Judges used vague and fanciful words to describe the term "injury to society" and, for this purpose, I need to cite a few examples:

   (a) usage of the words "to stipulate for iniquity" (per Wilmot LCJ in *Collins v. Blantern* [1767] 2 Wils KB 341 at 350);

   (b) usage of the phrase "contrary to the general policy of the law" (per Aston J in *Lowe v. Peers* [1768] 4 Burr 2225 at 2233);

   (c) usage of the language "against the public good" (per Wilmot LCJ in *Collins v. Blantern (supra)*);

   (d) usage of the phrase *"contra bonos mores"* (per Lord Kenyon in *Girardy v. Richardson* [1793] 1 Esp 13); and

   (e) employing the words like "*ex turpi causa*" (per Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp 341 at 343).

(2) The list of illegal contracts can never be closed. It includes, *inter alia*, contracts to commit crimes, torts or fraud, contracts to defraud the revenue, contracts affecting public safety or the administration of justice or the incorruptibility of public officers, contracts in regard to restraint of trade, and contracts that are sexually immoral.

(3) The consequences of an illegal contract may be stated in this way:

(a) If in its inception the contract is illegal, then neither party can assert that he did not intend to break the law. Where both parties have expressly and clearly agreed to do something which is prohibited at common law then the contract between them would be struck down for illegality. The same would also be true in a situation where both the parties have agreed to do something that is expressly or implicitly forbidden by statute (*Re Mahmoud and Ispahani (supra)*). Now, in both these two situations which I have enumerated, the contracts are intrinsically and inevitably illegal and no allowances would be made for any innocence. The rationale is very simple. It is this. That the contract is unlawful in its formation.

(b) If the contract is *ex facie* lawful, but both parties intend to exploit it for an illegal purpose then the contract is illegal in its inception despite the appearance of it being innocent. This would be the situation where both parties intend to accomplish an unlawful end and, consequently, both would be remediless. A good example would be the case of letting a flat where there is a common intention to use it for prostitution. Another example can be seen in the case of *Pearce v. Brooks* [1866] LR 1 Ex 213 where the plaintiff agreed to supply the defendant with a miniature brougham coach which he knew that she intended to use it for purposes of prostitution. The coach was not paid for and the plaintiff sued. It was held that the plaintiff failed in his claim because he was aware that the carriage would be used for immoral purposes and for that reason the courts refused to assist him to recover the price of the coach.

(c) If the contract is lawful in its inception, but somehow only one party alone intends to exploit it for an illegal purpose, then the law takes the view that the innocent party need not be adversely affected by the guilty intention of the other (*Oom v. Bruce* [1810] 12 East 225; *Clay v. Yates* [1856] 1 H & N 73 at 80; *Pearce v. Brooks* [1866] LR 1 Exch 213 at 217, 221; *Alexander v. Rayson* [1936] 1 KB 169 at 182; *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 220-221). Now, whether the innocent party is really innocent or guilty would be dependent upon whether he is implicated in the illegality (*Scott v. Brown, Doering, McNab & Co Ltd* [1892] 2 QB 724 at 728). To be precise, the question to pose would be whether the innocent party has participated in furtherance of the illegal activity (*Re Trepca Mines Ltd (No 2) (supra)*); *JM Allan (Mercandising) Ltd v. Cloke* [1963] 2 QB 340 at 348; and *Belmont Finance Corporation Ltd v. Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118). Allow me to give an example. For instance, if Alan lets a flat to Elizabeth, a woman whom Alan knows to be a prostitute then the very contract will be

unlawful if Alan knows that Elizabeth's intention is to use the premises for prostitution. But if Alan is only aware of Elizabeth's mode of life, it would be reasonable for Alan to infer that the purpose of Elizabeth renting the flat is merely to stay there and not to carry out an immoral activity, after all even a prostitute needs to stay in a house. Pure and simple, under this head the contract is lawful in its inception but is later illegally performed.

So much for the law on illegality. In the context of the present case, MAS contended that the agreement violated the Indian customs laws and was thus void for illegality. To recapitulate, ABDA collected its clients' excess baggages and loaded it into containers purchased by ABDA and ABDA would then declare them as unaccompanied baggages to the Malaysian customs authorities. The declaration can be found in the airway bill and the cargo manifest prepared by ABDA in preparation of having the containers loaded with unaccompanied baggages consigned to Madras as cargo. But by suppressing and withholding the airway bill and the cargo manifest from the Madras customs authorities and by tagging the unaccompanied baggages with baggage tags visually similar to that of MAS, these unaccompanied baggages purport to change its status from "unaccompanied baggages" to "accompanied baggages" and are then off loaded at the passenger arrival hall rather than at the cargo terminal.

ABDA knew that MAS was relying on the defence of illegality. ABDA would thus be in a position to foresee that MAS would lead evidence pertaining to Indian laws. But ABDA chose not to call witnesses to rebut the testimonies of Raman and Ganga. ABDA too failed to anticipate that MAS would lead such evidence.

As an advocate in Madras, Raman's evidence was principally to introduce and tender the various Indian statutes and regulations pertaining to Indian customs and he was also instrumental in assisting the court to understand the Indian customs laws in the context of the facts of the present case. Ganga, on the other hand, was a retired Indian Assistant Commissioner of Customs and he gave evidence in regard to the practical aspects of the Indian customs laws. In law, both Raman dan Ganga are considered experts. Section 45 of the Evidence Act 1950 enacts as follows:

(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.

ILLUSTRATIONS

(a) The question is whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A. is supposed to have died are relevant.

(b) The question is whether A., at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether symptoms exhibited by A. commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

and it permits the admissibility of the evidence of experts on foreign law in a situation when the court has to form an opinion upon a point of foreign law. In the present case, it was part and parcel of my judgment that Raman had properly tendered all the relevant foreign statutes and regulations in the course of the trial. In *Mak Sik Kwong v. Minister Of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175, 180, that brilliant judge in the person of Abdoolcader J (as he then was) aptly dealt with the issue of expert testimony in the context of that case in these salient words:

> Mr. Mohideen thereupon submits that there was no evidence that these matters were or are in fact rights accorded exclusively to citizens of China and suggests that I should take judicial notice of the law of China, but when I evinced horror at the suggestion and referred him to the provisions of section 45 of the Evidence Act, 1950 he resiled and promptly applied for an adjournment to file affidavits by experts on Chinese law as to rights accorded exclusively to Chinese citizens and specifically to show that attending educational institutions and entering China without the necessary documents and residing there as well as leaving that country with the permission of its authorities are not such rights.
>
> I refused the request for an adjournment for this purpose for two reasons. Firstly, the applicant obtained leave in these proceedings on November 20, 1973, and filed the substantive motion on December 3, 1973. The applicant therefore has had some twenty months at least to do what he thinks should now be done. Secondly, foreign law on a particular topic is a question of fact.

> An opinion upon a point of foreign law can be proved by evidence of experts (section 45(1) Evidence Act) and in this connection statements as to any law of any foreign country contained in law books, printed or published under the authority of the Government of that foreign country, are relevant (section 38 Evidence Act). The matters to be considered by the respondent under Article 24(2) are pure questions of fact and asking me to entertain evidence in this connection is, in my view, tantamount to asking the court to sit on appeal against the respondent's findings and re-try the matters entrusted to his discretion by the Constitution and his determination thereon. It is not the function or within the jurisdiction of the court to do so. If the respondent erred at all in considering Chinese law for the purposes of his determination in this matter, he erred only on a question of evidence and fact resulting at the most only in an evidential error of law not going to jurisdiction, but there is no indication that he did indeed do so.

It was erroneous to suggest that the testimonies of Raman and Ganga offended s. 92 of the Evidence Act 1950. Both Raman and Ganga merely took the stand and tendered documents relevant to show that the agreement and all the other documents that formed part and parcel of this case were in violation of the Indian customs laws and regulations thereto. At any rate, proviso (a) to s. 92 of the Evidence Act 1950 would save the day for MAS. Furthermore MAS pleaded the relevant facts in order to bring into motion the defence of illegality and by doing so MAS brought those facts within the ambit and purview of proviso (a) to s. 92 of the Evidence Act 1950. In the words of Terrel J in *ML Samuel v. Bhadur Singh alias Bahadur Singh* [1938] 7 MLJ (SSR) 173, 174:

> If the defendants wished to rely on any facts which would bring them within any of the provisos to section 93 (now section 92), such facts would have to be strictly pleaded, and it may be inferred from the report that the necessary allegations were neither made nor established.

On the value of the provisos to s. 92 of the Evidence Act 1950, I must reproduce the short speech of Salleh Abas FJ (as he then was) in *Tan Chong & Sons Motor Company (Sdn) Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 (FC). There his Lordship said:

> There is this rule of evidence contained in section 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add, or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section.

This was a fit case for proviso (a) to s. 92 of the Evidence Act 1950 to apply because MAS introduced the issue of illegality in its statement of defence and evidence was even led to show that the agreement was an illegality. In *Tukaram Mahadappa Rajmane v. Jaganath Savar m Kath'e* – which is usually referred to as *Tukaram v. Jaganath* AIR [1923] Bombay 236, 237 the court there observed that:

> It may very well be that writing may be an imperfect agreement of which a court cannot decree specific performance, but if on the face of it, it contains all the terms which would entitle it to be considered as a perfect agreement which could be enforced, then undoubtedly no parol evidence could be adduced so as to alter or add to its terms unless they came within one of the provisos to section 92 of the Evidence Act. No attempt has been made to bring this evidence within the 1st proviso. No fraud intimidation illegality, want of due execution or want of capacity in any contracting party or want or failure of consideration is suggested.

and, in the context of the present case, MAS not only suggested the existence of illegality it went further by stating it in its statement of defence and by leading evidence through Raman and Ganga.

Both Raman and Ganga were experts in Indian customs laws – a foreign law. It is a correct assertion of the law to state that a foreign law is a question of fact where the courts are not supposed to be conversant with. Opinions of experts on foreign law are therefore admissible and ought to be admitted. In the case of *Mosque known as Masjid Shahid Ganj and Others v. Shiromani Gurdwara Parbandhak Committee, Amritsar and Another* [1940] AIR 116 Privy Council, Sir George Rankin speaking for the Privy Council had this to say at p. 119 to p. 120 of the report:

> A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman J. to the contrary, 47 All 823 *Aziz Banu v. Muhammad Ibrahim Husain*, [1925] 12 AIR All 720=89 IC 690=47 All 823=23 ALJ 768 at p. 835, was cited to him but he wrongly considered that s. 49, Evidence Act, was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of pandits on questions of Hindu law and the reference made thereto in 12 MIA 397 *Collector of Madura v. Moottoo Ramalinga Sathupathy*, [1868] 12 MIA 397=1 Beng LR 1=2 Suther 135=10 WR 17=2 Sar 361 (PC) at pp. 436-9. No great harm, as it happened, was done by the admission of this class of evidence as the witnesses made reference to authoritative texts in a short and sensible manner.
>
> But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. The Muslim law is not the common law of India; British India has no common law in the sense of law applicable *prima facie* to everyone unless it be in the statutory Codes, e.g. Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of

people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of 'expert advisers' (muftis, maulavis or in the case of Hindu law pandits) had its day but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to:

> It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted.

The sage words of RS Sarkaria J in *State (Delhi Administration) v. Pali Ram AIR* [1979] SC 14 at 21 and 22 should be reproduced. There his Lordship said:

> It is not the province of the expert to act as Judge or Jury. As rightly pointed out in *Titli v. Jones*, ILR 56 All 428: AIR 1934 All 273 the real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking, such issues are for the Court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The Court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence.
>
> In this connection, the observations made by Hidayatulla J (as he then was) in *Fakharuddin v. State of Madhya Pradesh (ibid)* (AIR 1967 SC 1326) are opposite and may be extracted (at pages 1328, 1329):
>
> > Both under ss. 45 and 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case, the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in one case and to appraise the value of the opinion in the other case. The comparison depends on an analysis of

> the characteristics in the admitted or proved writings and the finding of the same characteristics in a large measure in the disputed writing. In this way, the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion, whether of the expert or other witness.

Perhaps the case of *Regazzoni v. KC Sethia (1944), Ltd* [1956] 1 All ER 229 is on all fours with the present case. That was a case where the evidence of Indian law was given by a member of the English bar who previously held judicial and legal appointments in India. It would be sufficient for this exercise to refer to the headnote:

> On account of a dispute between India and South Africa about the treatment of Indians in South Africa, the Indian government, by a Regulation made in July, 1946, prohibited the taking by sea or by land out of British India of goods destined for the Union of South Africa or which although destined for a port or place outside the Union of South Africa were intended to be taken to the Union of South Africa. Infringement of the Regulation would render the goods liable to confiscation and the shipper (or person held responsible) liable to a penalty of three times the value of the goods. In September, 1948, the plaintiff and the defendants entered into an agreement under which the defendants undertook to sell and deliver to the plaintiff in September/October, 1948, c.i.f. Genoa, a quantity of jute bags. To the knowledge of both parties the goods were to come from India and were required for sale in South Africa. At the time of the making of the contract both parties were aware that the shipment would be contrary to the Regulation of 1946. The defendants failed to deliver the jute bags and the plaintiff claimed damages for their non-delivery. It was agreed that English law governed the contract.
>
> Held: the agreement of 1948 was unenforceable and accordingly the plaintiff could not recover damages, because
>
> (a) the court recognised that in 1948 the shipment of the jute bags from India was illegal, since the Regulation prohibiting such export was not such as would be disregarded in this country as being a penal or revenue enactment, or confiscatory or political and
>
> (b) the agreement to the knowledge of both parties at the time of contracting could not be performed without violating in a foreign and friendly country, namely, India, the law of that country and was, therefore, unenforceable in English law.

Ganga was not legally trained. He had no legal education. He was an Indian customs officer of long standing. His experience would be sufficient to make him an expert on the question of Indian customs laws. A case in point would be that of *Said Ajami v. Comptroller Of Customs* [1954] 1 WLR 1405 PC. In that case *Mr Lmd De Silva* writing for the Privy Council had this to say (see p. 1407 to p. 1410):

> It was necessary to call an expert to prove that the francs were legal tender in West Africa on June 15, 1951, and the expert evidence called by the respondent was that of one Mr. Greenway. The whole of his evidence, given in examination-in-chief, consisted of the following: 'Manager, Barclay's Bank, Kano, in banking business 32 years, 24 years in Nigeria, I look at these notes, they are to the best of my knowledge French colonial franc notes, they were legal tender in French West West Africa on June 15 this year. On that day these francs were worth 490 to 1 pound English note. The English value of 9,884,500 francs is therefore, 20,172 pounds'.
>
> He was not cross-examined and no evidence was led by the appellant to contradict what he said. After the respondent had closed his case the appellant did not give evidence, nor was any evidence led on his behalf.
>
> The appellant concedes that Mr. Greenway is a credible witness, but contends that upon the facts deposed to by him he cannot be regarded in law as a competent expert witness. It is further contended that even if it be held that Mr. Greenway was competent to give evidence as an expert, he has so qualified his evidence that it cannot be regarded as proving the facts sought to be established.
>
> It has been argued strenuously that upon a matter which involves a question of law no person who is not a professional lawyer could be regarded as a competent expert. Their Lordships do not agree. In *Vander Donckt v. Thellusson* [1849] 8 C.B. 812, it was held that a person who though not a lawyer, had become conversant with a point of foreign law by 'carrying on a business which made it 'his interest to take cognisance' of the point, was a competent witness on that point. Their Lordships share this view. A number of other cases were cited to their Lordships which although they contain observations relevant to the facts of each case do not, in their Lordships' view, qualify in any way the principle stated in the case referred to above. Their Lordships do not propose to refer to each of these cases separately. A principle which emerges from them considered together is that not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitle him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law.

Their Lordships observe that there is nothing opposed to the views they have expressed above in the relevant statute law of Nigeria, which is to be found in sections 56 and 57 of the Evidence Ordinance of Nigeria and is to the following effect.

> 56. (1) When the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts (2) Such persons are called experts.
>
> 57. (1) Where there is a question as to foreign law the opinions of experts who in their profession are acquainted with such law are admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself. (2) Any question as to the effect of the evidence given with respect to foreign law shall instead of being submitted to the jury, in the case of trial with a jury, be decided by the judge alone.

The Ordinance enacts that the evidence of a person 'specially skilled' on a point of foreign law is admissible as expert evidence. The knowledge which entitles a person to be deemed 'specially skilled' on some points of foreign law may, in their Lordships' opinion, be gained in appropriate circumstances by a person whose profession is not that of the law.

In the case before them, their Lordships have to be satisfied on two points before they can regard Mr. Greenway as competent. Firstly, that he conducted a business which made it his interest to take cognizance of what notes were legal tender in French West Africa. Secondly, that he did in fact take cognizance of what notes were legal tender in that country.

It would have been prudent for the respondent to have led evidence more clearly directed to establishing both these points. As the recorded evidence is very much compressed their Lordships have had some difficulty in arriving at a conclusion.

It appears from a notification in the Gazette of November 9, 1950, that Barclays Bank had been appointed an 'authorized dealer in foreign currency' within the meaning of that term in the Exchange Control Ordinance (No. 35 of 1950) of Nigeria. It is also clear from sections 5 and 42 (to which their Lordships do not think it necessary to make detailed reference) of that Ordinance that dealings in foreign currency could normally be conducted only by an 'authorized dealer.'

It is difficult to imagine that an 'authorized dealer' would not keep himself informed as to the notes that were legal tender in French West Africa, an adjoining territory, unless special circumstances existed which rendered unnecessary for him so to do. No such special circumstances have been proved or even suggested in the evidence in the case.

It was suggested by counsel for the appellant that the Gazette had not been properly produced in the courts below as there is no notice in the record of the occasion when this was done. There is, however, a reference to the fact that Barclays Bank was an authorized dealer in the judgment of the Magistrates' court, and a reference to the Gazette itself in the judgment of the Court of Appeal. Their Lordships are of the view that the Gazette was properly before the courts in Africa although no entry has been made in the record of its production.

Counsel for appellant argued with force that, although it has been shown that Mr. Greenway was a manager of a branch of Barclays Bank, it has not been shown that as part of his duties he kept in such close touch with the currency of French West Africa as to make him competent to give the evidence which he did give. After anxious consideration their Lordships are of the opinion that the argument should not be accepted. Mr. Greenway is a manager of a branch of Barclays Bank in Nigeria, and has been in banking business for 32 years, 24 years of which have been spent in Nigeria. He has been regarded without challenge by the courts below as a credible witness, and he must also be regarded as a person with a sense of responsibility. Therefore the opinion which he has expressed cannot be the result of mere conjecture. It has been suggested by counsel for the respondent that upon a fair view of the evidence as a whole it must be presumed that Mr. Greenway was speaking from adequate personal experience. This suggestion their Lordships accept.

It has also been contended that the use of the words 'to the best of my knowledge' by Mr. Greenway so qualified his evidence as to render it of no probative value. Their Lordships do not agree. The meaning of the words mentioned could be best appreciated by the judge who saw the witness and heard the evidence given and the qualification cannot be said to deprive the witness's evidence of all probative value. No attempt was made by the appellant to contradict what Mr. Greenway said, and their Lordships are of the view that his evidence must be held to have established the facts to which he deposed.

For the reasons given their Lordships are of the opinion that it must be held that Mr. Greenway was a person who in the course of his business had to, and did, keep in touch with current law and practice with regard to notes that were legal tender in French West Africa. They are of the opinion that the notes of which exportation was attempted must be held to be notes of which were legal tender in French West Africa on June 15, 1951. They will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

Raman gave his opinion as an expert. Legally qualified and quick on the uptake he testified that the arrangement between MAS and ABDA was made with obvious intentions of contravening and evading the customs laws of India. But I was cautioned. According to Mr Sri Dev Nair, I ought to be wary of the opinions expressed by Raman. It was pointed out that since the commencement of his practice in 1978, Raman had only appeared in twenty to twenty-four cases before the customs excise and gold control appellate tribunal. It was submitted that Raman's familiarity and expertise on customs law came principally from the opinions which he expressed in relation to the Indian Customs Act. It was emphasised that Raman had never given evidence in an Indian Court nor in any foreign court and this was his first court appearance as an expert giving evidence in regard to the Indian customs laws. It was pointed out that Raman:

(1) had not written any articles pertaining to the Indian Customs Act;

(2) had not written any books on the Indian Customs Act;

(3) had not interviewed the personalities that attended the meeting on 16 November 1995 as seen at p. 7 of the "Ikatan Dokumen-Dokumen" in encl. 15 before he rendered a written opinion as seen in exhibit marked as "D19".

But, Raman's written opinion in "D19" cannot simply be swept under the carpet. His written opinion must be considered by this court. I will now reproduce in verbatim Raman's written opinion beginning from para. 8.1 to para. 8.3:

> 8.1. Given the above provisions of the Customs Act 1962 and the Import Manifest (Aircraft) Regulations 1976, the Commander of the aircraft or any Authorised Agent of the Carrier, would be in serious error in allowing the unloading of unaccompanied baggage as accompanied baggage, particularly when the same has been consigned under an Airway Bill, declared as unaccompanied baggage and included in a Cargo Manifest at the port of embarkation (Kuala Lumpur in this case).
>
> 8.2. Under S115 of the Customs Act, the aircraft which has carried imported goods into India from which a portion of which goods is missing, is liable for confiscation.
>
> 8.3. Under S132 of the Customs Act, the making of false declaration is punishable with imprisonment for a term which may extend to six months, or with fine, or both. The Commander of the aircraft or the Authorised Agent of the Carrier would have, at the port of embarkation, namely Kuala Lumpur, made a declaration to the Customs authority at Kuala Lumpur. In this declaration, the ABDA Cargo for which an Airway Bill

has been cut, would have been listed as cargo. This cargo will also be included in the Cargo Manifest given to Customs at Kuala Lumpur. The Commander or the Authorised Agent of the Carrier would be submitting an Import Manifest to the Customs Authorities in India which would exclude these ABDA items. This suppression of documentation, creation of false documentation and consequent making of a false declaration is not the result of any innocent error but a vital element in the furtherance of a scheme which forms the basis of the agreement between parties.

This would be followed by para. 9.1, para. 9.2 and para. 10 of Raman's written opinion:

9.1 Under S77 of the Act, the owner of the baggage has to declare the value of the contents of his baggage. The Baggage Rules 1994 which applied at the relevant time between November 1995 and March 1996, are framed under the Customs Act and have the object of restricting the importation of banned or prohibited goods and also for levy of customs duty on the import of certain items based on value. Under the Baggage Rules 1994 which came into force on 01/03/1994 and applied at the relevant time of currency of the arrangement between ABDA and MAS, a free Allowance of INR 4,000 only was available with reference to dutiable items carried in the baggage of a passenger. This allowance was only applicable to the checked-in and hand baggage of the passenger and not available in the case of his unaccompanied baggage. By an amendment to The Baggage Rules 1994 in 1996 which came into force after 23rd July 1996, the free allowance was increased from Rs. 4,000 to Rs. 6,000. There was no change in the position that this allowance was not available in the case of unaccompanied baggage of the passenger. Unaccompanied Baggage was chargeable with duty at 50 percent ad valorem plus 10 percent Surcharge plus 4 percent Special Additional Duty.

9.2. On board the aircraft, the passenger is given a Disembarkation Card by the carrier which conforms to the requirements of the laws of the port of destination. This disembarkation Card will consist of 2 parts: one intended for purposes of immigration and the other for purposes of Customs. The part required by Customs will indicate the number of items of baggage of the Passenger and the value of contents. A mis-declaration by the passenger would arise if he should exclude in the number of items of baggage declared on this form the ABDA items which would lead to a discrepancy in the total number of items of baggage he would be clearing at Passenger Arrival Hall and clearing through Customs. If he should, on the other hand, include as baggage what he has consigned through ABDA, here again there is a mis-declaration, in that, property for which the passenger does not hold a checked-in baggage tag and cargo for which an Airway Bill has been cut will be sought to be cleared as accompanied baggage. In either event, there would be a mis-declaration by the passenger. The object of the Baggage Rules framed under the Customs Act to exclude unaccompanied baggage from Duty Free

> Allowance will also be defeated. S132 of the Customs Act which relates to the making of false declaration would also apply to the passenger who would have mis-declared the number of items of baggage carried as mentioned earlier. The correct declaration of the number of items and value becomes relevant for the purposes of assessment to Customs Duty.
>
> 10. For the above reasons, I am of the opinion that the arrangement contemplated by ABDA and MAS cannot be legally performed in India without directly violating the Indian Customs Law and without visiting the carrier MAS and its passengers with serious penal consequences in the event of detection. I will be glad to send you any further clarifications should you require the same.

The law and the sting of Raman's written opinion was simply this. That the agreement cannot be legally performed in India. The agreement contravened the Indian customs law and it brought with it dire penal consequences. MAS was acting prudently when it terminated the agreement. Tainted with illegality, MAS had no choice but to put an end to the agreement.

As an expert Raman assisted the court on the question of foreign law. The realm of Raman's duty was not in the area of "fact finding" and that being the case there was no necessity for Raman to interview those personalities that attended the meeting on 16 November 1995 (see *State (Delhi Administration) v. Pali Ram (supra)*).

In regard to the complaint that Raman had never given evidence in a trial prior to this, reference should be made to the learned judgment of that brilliant judge by the name of Abdoolcader FJ in the case of *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; ([1983] CLJ (Rep) 101) FC. At p. 19 (p. 117) of the report, his Lordship in style said:

> One can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not from formal training (*R. v. Murphy* [1980] Q.B. 434). The learned Judge who saw and heard Gee accepted him as an expert after a considered assessment of his evidence and we see no reason or justification whatsoever to dissent from his conclusion. Mr. Jagjit Singh complains that Gee has never given evidence in the High Court but we can see no rule requiring this as a prerequisite to accepting him as an expert. He has given evidence, as he said, in the lower courts and even if he had not that would not debar him from being accepted as an expert if he could satisfy the court as to his standing, as there is always a first time for everything. Previous testification in court as an expert witness is no doubt an added consideration but not necessarily the primary consideration for an otherwise qualified person.

and I may add that in not having written a book or an article would not affect Raman's standing as an expert at all.

Mr Sri Dev Nair submitted that Raman's evidence was wholly irrelevant, highly inconsistent and very speculative and he too submitted that Raman attended court to "deliberately shoot down" a legally binding agreement which was enforceable in law. It was, with respect, a submission that was mischievous in the extreme. Now, assuming for a moment that the agreement was enforceable in law and MAS must fulfil its obligations under the agreement, what would be the repercussions on MAS if MAS were to proceed with the agreement regardless of the expert legal opinions of Raman? The Indian authorities would show no mercy to MAS. In the first place, MAS's aircraft may be subject to confiscation. In the second place, the suppression of documentation and the making of false declaration would certainly attract penal consequences. In his witness statement in encl. 23, Raman was asked in regard to the legality of the agreement in the context of the Indian customs laws and this was what he said at p. 2 thereof:

> I had replied giving my preliminary opinion on the legality of the arrangement with particular reference to the customs laws applied in India. My opinion was that this arrangement between MAS and ABDA was made with obvious intentions to contravene and evade the customs laws of India and the performance thereof would result in direct violation of the customs laws of India with serious consequences.

At question 10 of his witness statement, Raman proceeded further:

> Q10: Mr. Raman, in your opinion what is or are the specific Indian laws that would be contravened had this agreement continued?
>
> A: Principally the procedures involved in the arrangement clearly result in contravention of the provisions of the Indian Customs Act 1962 read together with the Import Manifest (Aircraft) Regulations 1976 and The Baggage Rules 1994.

According to Raman in his witness statement, even the commander of the aircraft would not be spared. At p. 5, under category (8) of his witness statement this was what Raman said:

> (8) Given the above provisions of the Customs Act 1962 and the Import Manifest (Aircraft) Regulations 1976, the Commander of the aircraft or any Authorised Agent of the carrier, would be in serious error in allowing the unloading of unaccompanied baggage as accompanied baggage, particularly when the same has been declared as unaccompanied baggage at the port of embarkation (Kuala Lumpur in this case).

Finally, the bombshell came in through questions 17 and 18 of Raman's witness statement thereof. The answers thereto would certainly put the submissions of Mr Sri Dev Nair to nought. I will now reproduce questions 17 and 18 and the answers thereto:

> Q17: Mr. Raman, are there any sanctions, penal or otherwise, imposed by the Customs Act on any contravention of the provisions of the Customs Act that you have just mentioned?
>
> A: (1) Under S115 of the Customs Act the aircraft which has carried imported goods into India from which a portion of which goods is missing, is liable for confiscation.
>
> (2) Under S132 of the Customs Act, the making of false declaration is punishable with imprisonment for a term which may extend to six months, or with fine, or both. The Commander of the aircraft or the Authorised Agent of the Carrier would have, at the port of embarkation, namely Kuala Lumpur, made a declaration to the Customs authority at Kuala Lumpur. In this declaration, the ABDA Cargo for which an Airway Bill has been cut, would have been listed as cargo. This cargo will also be included in the Cargo Manifest given to Customs at Kuala Lumpur. The Commander or the Authorised Agent of the Carrier would be submitting an Import Manifest to the Customs Authorities in India which would exclude this ABDA Cargo.
>
> (3) S132 of the Customs Act which relates to the making of false declaration would also apply to the passenger who would have mis-declared the number of items of baggage carried as mentioned earlier. The correct declaration of the number of items and value becomes relevant for the purposes of assessment to Customs Duty.
>
> Q18: Mr. Raman, in your opinion could this arrangement be legally performed in India?
>
> A: In my opinion this arrangement cannot be legally performed in India without directly violating the Indian Customs Law.

Taken in its correct perspective Raman's expert evidence was of great help to me. Due weight must be given to it accordingly. It came as no surprise that MAS had to terminate the agreement. The agreement itself was tainted with illegality and its life span was rightly curtailed by MAS. This was my judgment and I so hold accordingly.

It would not be out of place to refer by way of an analogy to a book entitled *"Carver's Carriage By Sea"*, vol. 1, 12th edn, by Raoul Colinvaux, where at p. 506 to p. 507, the learned author had this to say:

And whatever law may determine the rights and liabilities of the parties under a charterparty or bill of lading, still, in considering how the provisions of the contract are to be carried out, it may be necessary to take other rules of law into account. Rules which must be conformed to at the places of performance – e.g. customs regulations at the ports of loading and discharge – form part of the circumstances with regard to which the loading or delivery is to be done. The contract must be supposed had reference to them, unless it is expressly inconsistent: and it will not be properly performed unless they have been regarded.

> It seems impossible to exclude the law of England (the place of discharge), or even that of Hayti (the place of loading), from relevancy in respect of the manner of performing that portion of the service contracted for which was to be rendered in their respective territories; because the ship must needs, for the time being, conform to the usages of the port where she is. Per Willes J., *Lloyd v. Guibert* [1865] L.R. 1 Q.B. 115, 126. Cl per Bowen L.J., *Jacobs v. Credit Lyonnais* [1884] 12 Q.B.D. 589, 604.
>
> English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and apart from such incorporation other laws may have to be regarded in giving effect to the contract. Per Lord Wright in *Vita Food Products v. Unus Shipping Co.* [1939] A.C. 277, 291.'

But the law of the place of performance is thus incorporated only so far as it is consistent with the express language of the contract, as interpreted by its proper law; and only so far as may be necessary for determining the manner of the performance. It will not alter the character of the obligations which are imposed by the contract, or by the law (if that is different) which governs its effect. On that ground a charterer was held not to be excused form loading a cargo because the law of the loading port excused his doing so, *Blight v. Page* [1801] 3 B. & P. 295, note: *Kirk v. Gibbs* [1857] I H. & N. 810. But see, as to these cases, infra, 601-603. See also *Jacobs v. Credit Lyonnais* [1884] 12 Q.B.D. 589; *Vita Food Products v. Unus Shipping Co.* [1939] A.C. 277, 291, nor is a shipowner discharged from liability for damage because no claim has been made at the time or in the manner required for doing so by the law at the port of discharge, if that is not the proper law of the contract *Moore v. Harris* [1876] 1 A.C. 318.

Foreign law question of fact. The rules of foreign law are questions of fact, and thus a finding by an arbitrator as to the law at the place abroad of performance is conclusive, although a court there has held otherwise *Evera S.A. v. Bank Line* [1961] 1 Lloyd's Rep. 231 (H.L.).

The learned author of the same book continued in serious vein when he said at p. 512:

> The question of validity becomes more difficult, and the answer more uncertain, where the contract is one which is not illegal according to our law, but is so according to the law of the place where it was made, or according to that of the place where it was to be performed.
>
> If the result of enforcing the contract will be to enable a breach of the laws of a foreign state to be committed within that state, it would seem that policy and comity require that the contract should be regarded as an illegal thing, and not enforced. *Heriz v. Riera* [1840] 10 L.J. Ch. 47; 11 Sim. 318; *De Wiitz v. Hendricks* [1824] 2 Bing. 314.

which when translated to the facts of the present case simply meant that the agreement was not enforceable in law. To put it in another way, though the agreement may not appear *ex facie* illegal in Malaysia yet that very agreement was considered illegal in India and so, by virtue of public policy, that agreement must be regarded as illegal and unenforceable in Malaysia. The result of enforcing the agreement would mean that there would be a continuing breach of the Indian customs laws. Must MAS continue to abide by the agreement notwithstanding that the agreement would run foul of the Indian customs laws? Certainly not. The law is crystal clear. A contract with the intention of committing an illegal act is unenforceable at the instance of the party that has that intent (*Regazzoni v. KC Sethia (1944), Ltd (supra)*). This simple proposition of the law applies even though the very act is illegal only by the law of the foreign state and it is to be performed in that foreign state only. I must take heed of what Viscount Simonds said in *Regazzoni v. KC Sethia (1944), Ltd (supra)* particularly at p. 290 of the report and this was what his Lordship said:

> Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity.

The Court of Appeal in *Foster v. Driscoll* [1929] 1 KB 470 refused to enforce a contract of partnership with the object of smuggling whisky into the United States during the period when liquor was prohibited there.

Likewise here, the mechanism under the agreement could not be carried out in India because it was prohibited there. This court must, out of deference, rule that the agreement was illegal and that it cannot be carried out in India. In the circumstances, MAS was certainly justified in repudiating the agreement.

I have proceeded in an arduous course in preparing this judgment in order to lay emphasis on the submissions advanced by counsel for both sides. There were, however, minor and inconsequential points that were not addressed in this judgment but in its totality this judgment can be said to be wholesome and complete. For the reasons adumbrated above, ABDA's claim must be dismissed with costs.

Addendum

Earlier I alluded to a book entitled "*Air Law*" by Shawcross and Beaumont, 4th edn, vol. 1, Issue 83, March 2001. It is certainly a good reading material and I am grateful to the librarian in the person of Madam Halijah bte Othman who took the effort in securing that book for my reference. In Chapter 24 Division VII, under category "Carriage by Air" and under the sub-title "Common law as to carrier's liability", the learned authors had this to say (see p. VII/I):

> The carrier's duties and liabilities to passengers and the owners or consignors of goods are governed either by the common law of carriage or, increasingly, by the provisions of international conventions as to international carriage and statutory provisions (often adopting similar principles) governing non-international carriage. The common law may hold a carrier liable.
>
> (a) on the basis of implied terms in the contract of carriage;
>
> (b) on the basis of the fact of carriage under principles closely related to the law of bailment of goods; or
>
> (c) on the basis of the general principles of the law of negligence, including its application in the form of occupier's liability.
>
> The common law as to carriers, like the law of bailment to which it is related, is of ancient origin (For its history, see *EGM Fletcher, The Carrier's Liability* [1932]. For a comparison of civil law and common law approaches to the notion of carriage, see *G Miller, Liability in International Air Transport* [1977], pp7-10).

and MAS must certainly take heed of its position as our national carrier. At p. VII/3 to p. VII/4 of the same book, the learned authors explained the meaning of the phrase "common carriers" in this way:

> It is believed that there is no English case in which an air carrier has been held to be a common carrier. In *Aslan v. Imperial Airways Ltd*, however, MacKinnon J said:
>
> > If a man who owned an aeroplane or a seaplane chose to engage in the trade of carrying goods as a regular business and to hold himself out as ready to carry for any who wished to employ him so far as he

had room in his airship or aeroplane for their goods, very likely he could become a common carrier or be under the various liabilities of a common carrier [1933] 149 LT 276 at 278. See also McNair, *Law of the Air* (3rd Edn) (1964) 138-144, and, for the view that an air carrier cannot be a common carrier, *Fletcher* [1934] 30 LQR 329. See the definition, to the same effect, in FAA Advisory Circular No 120-12A (24 April 1988), cited in *Woolsey v. National Transportation Safety Board* 993 F 2d 5/6 (5th Cir, 1993), 24 Avi 17,642, cert den 114 S Ct 1829 [1994].

It has been accepted in Canada that an air carrier may be a common carrier (*Galer v. Wings Ltd* [1939] 1 DLR 13 (Man), I Avi 778; *Nysted v. Wings Ltd* [1942] 3 DLR 336 (Man), I Avi 1036: *Walrod v. Severn Enterprises* [1956] US Av 302 (Ont). See also *Ludditt v. Ginger Coote Airways Ltd* [1942] 4 DLR 353 (Can SC), [1942] US Av 178 (Affd [1947] AC 233, [1947] 1 All ER 328, PC, where the point is not fully discussed), and in the United States air carriers have been held in numerous cases to be common carriers of passengers (*North American Accident Assurance Co v. Pitts* 104 So 21 (Ala, 1925), I Avi 67, and *Brown v. Pacific Mutual Life Assurance Co* 8 F 2d 996 (5th Cir, 1925), I Avi 77 (in which cases, however, it was held on the facts that the carrier was not a common carrier) and, eg, *Smith v. O'Donnell* 12 P 2d 933 (Cal, 1932), I Avi358; *McCusker v. Curtiss-Wright Flying Services Inc* 269 Ill App 502 [1933], I Avi 430; *Conklin v. Canadian Colonial Airways Inc* [1934] US Av 21; affd 194 NE 692 (NY, 1935), I Avi 571; *Casteel v. American Airways Inc* 88 SW 2d 976 (Ky, 1935), I Avi 594; *Cudney v. Midcontinent Airlines* 254 SW 2d 662 (Mo, 1953), 3 Avi 17,964; *Reuter v. Eastern Airlines* 226 F 2d 443 (5th Cir, 1955), 4 Avi 17,829; *Arrow Aviation Inc v. Moore* 266 F 2d 488 (8th Cir, 1959), 6 Avi 17,387; *Atcheson v. Braniff International Airways* 327 SW 2d 112 (Mo, 1959), 6 Avi 17,567; *Jackson v. Stancil* 116 SE 2d 815 (NC, 1960), 6 Avi 18, 281; *Brill v. Indianapolis Life Insurance Co* 784 F 2d 1511 (11th Cir, 1986), 19 Avi 18,394 (helicopter operator, subsidiary of Aer Lingus). That an air carrier could be a common carrier is recognised in 49 USC 40102 (27)), and, although less frequently, of goods (*Eg, Globe and Rutgers Fire Insurance v. Airborne Flower and Freight Traffic* 306 P 2d 26 (Cal App, 1957), 5 Avi 17,264, affd 314 P 2d 741 (Cal, 1957), 5 Avi 17,562).

In practice, it seems unlikely that a carrier by air would be held in England to be a common carrier in view of the conditions of contract under which such carriers normally operate. The defendants in *Aslan v. Imperial Airways Ltd* ([1933] 149 LT 276), were held not to be common carriers as their conditions of carriage reserved to the carrier the right to refuse to accept goods for carriage, and also as the consignment note contained an express repudiation of the status of common carrier; this latter fact alone would not, it seems, have

been decisive (see para VII(3)). It follows from this case and from cases such as *Belfast Ropework Co Ltd v. Bushell* ([1918] 1 KB 210) that a carrier using conditions (Eg, conditions based upon the 1953 Honolulu IATA Conditions) reserving the right to refuse goods will not be a common carrier.

At p. VII/5, under the sub-title "Refusal of Carriage", the learned authors explained that phrase in these words:

A common carrier is under an obligation to accept for carriage all passengers or goods offered to him. This obligation is the same in respect of both passengers and goods (*Ludditt v. Ginger Coote Airways Ltd* [1947] AC 233 at 240-241, PC See 5(1) *Halsbury's Laws*, (4th Edn Reissue), paras 441-2; Macnamara, *Law of Carriers by Land* (3rd Edn) 23 et seq.). It is subject to certain exceptions, designed to protect the carrier and other passengers or consignors. So, the carrier need not accept goods improperly packed (London and *North Western Rly Co v. Richard Hudson & Sons Ltd* [1920] AC 324, HL), or passengers unfit to travel (Note also Race Relations Act 1976, s. 20; see para VII(10)); and he may refuse carriage if he does not receive the full and proper price (*Wyld v. Pickford* [1841] 8 M & W 443). A common carrier is liable to an action for damages if he wrongfully refuses to accept passengers or goods for carriage.

At the same page (referring to p. VII/5), the learned authors explained the meaning to the phrase "Obligations As To Carriage of Goods" in these refined words:

A common carrier of goods is responsible for the safety of the goods from the time he accepts them until delivery, and is liable for their loss, delay or damage from any cause whatever except (i) Act of God, (ii) acts of the Queen's enemies, (iii) the 'inherent vice' of the goods themselves or (iv) default or misconduct on the part of the consignor (eg, in respect of the packaging or labeling of the goods). This liability of a common carrier of goods is often described as being that of an 'insurer' of the goods carried (See 5(1) Halsbury's Laws, (4th Edn Reissue), para 446 et seq; Carver, *Carriage by Sea* (13th Edn) (1982), s. 15.

A common carrier of goods ceases to be liable as such once the goods have reached their destination and the consignee has been given notice of their arrival and has had a reasonable time to collect the goods (*Chapman v. Great Western Rly Co* [1880] 5 QBD 278; *Shepherd v. Bristol and Exeter Rly Co* [1868] LR 3 Exch 189. In *McKinnon v. Acadian Lines Ltd* [1977] 81 DLR (3d) 480 (see note by *NE Palmer*, [1979] 58 Can Bar Rev 117), it was held that contractual terms limiting a carrier's liability do not apply beyond the period within which the carrier is acting as such, and so do not protect him, or sub-bailee, against negligent misdelivery. Where, however, the contract contemplates that the carrier will continue to have some responsibility for the goods after the completion of the carriage, ie, as bailee, any immunities from liability

conferred by the contract may operate to protect him in his capacity as bailee, and may extend to protect, in appropriate cases, his servants or agents (*Port Jackson Stevedoring Pty Ltd v. Salmond and Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138, PC.).

In so far as the duties of the common carrier of goods are strict, and liability is therefore not based on negligence, attempts by contractual term or notice to exclude liability for breach of duty are not affected by the Unfair Contract Terms Act 1977 (See para I(157-I(159)); contracts entered into by common carriers do, however, come within the scope of the EC Directive on unfair terms in consumer contracts (See para I(160). For the 'released value doctrine' in United States federal common law, governing the power of a common carrier to limit its liability in the carriage of goods, under which a carrier can limit recovery to an amount less than the actual loss only if there is the option of paying a higher charge to avoid the limitation, see *First Pennsylvania Bank v. Eastern Airlines Inc* 731 F 2d 1113 (3rd Cir, 1984), 18 Avi 17,990; *Deiro v. American Airlines Inc* 816 F 2d 1360 (9th Cir, 1987)), 20 Avi 18,022; *Matrka v. Delta Airlines Inc* 688 NE 2d 1130 (Ohio Cas, 1997), 26 Avi 15,727; *Williams v. American Airlines Inc* (EI) Pa, 1998).

Certainly these principles of law as set out by the learned authors of that book would set the minds of even the dullest astir. But, in the context of the present case, I am constrained to decide entirely on the facts and the submissions of the parties. Everything revolved on the agreement and the parties were focussing their attention to the agreement and nothing else. Witnesses took the stand and gave their versions of the whole episode and I had to sieve through their testimonies with a toothcomb. It was a time consuming exercise. But that is what justice is all about. I reiterate that ABDA's claim must be dismissed with costs.